

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS

3 UNITED STATES OF AMERICA)
4)
5 vs.) Criminal Action
6)
7 RAFAEL LEONER-AGUIRRE,) No. 15-10338-FDS
8 Defendant)
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15 BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV
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17 JURY TRIAL DAY 10
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20
21 John Joseph Moakley United States Courthouse
22 Courtroom No. 2
23 1 Courthouse Way
24 Boston, MA 02210

25 November 20, 2017
8:07 a.m.

Valerie A. O'Hara
Official Court Reporter
John Joseph Moakley United States Courthouse
1 Courthouse Way, Room 3204
Boston, MA 02210
E-mail: vaohara@gmail.com

1 APPEARANCES:

2 For The United States:

3 United States Attorney's Office, by GLENN A. MacKINLAY,
4 ASSISTANT UNITED STATES ATTORNEY, and KUNAL PASRICHA,
5 ASSISTANT UNITED STATES ATTORNEY, 1 Courthouse Way, Suite 9200,
6 Boston, Massachusetts 02110;

7 For the Defendant:

8 KEITH S. HALPERN, ESQ., 572 Washington Street, Suite 19,
9 Wellesley, Massachusetts 02482.
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1 PROCEEDINGS

2 THE CLERK: All rise. You may be seated. Court is
3 now back in session.

4 THE COURT: Good morning, everyone. We're starting a
5 couple minutes later here because it takes so long to print out
6 the current draft, which I've circulated to you. Let me start
7 by talking about things other than the jury instructions to
8 make sure we're all on the same page.

9 We are going to, I think, read a stipulation to the
08:07AM 10 jury; is that right?

11 MR. HALPERN: Yes. I actually prepared it so that if
12 you want to do it to put it in as an exhibit.

13 MR. PASCRIHA: We don't have an objection, your
14 Honor, counsel can read it into the record. He can submit it.
15 It's just a paragraph from a report.

16 THE COURT: All right. Reading is the norm, but I
17 don't have an opinion one way or the other. If you agree, it
18 can go in writing, that's fine.

19 MR. PASCRIHA: We had assumed he would just read it
08:09AM 20 into the record.

21 MR. HALPERN: It's a little convoluted, so I'd like
22 to --

23 MR. PASCRIHA: No objection.

24 THE COURT: We'll mark it as an exhibit. So, what
25 exhibit number?

1 THE CLERK: 292. All right. That will be
2 Exhibit 292.

3 THE COURT: Second, I need, I think, to instruct the
4 jury to disregard any evidence concerning the robbery of
5 Irwin Martinez on April 9th, 2014, including the testimony, the
6 video and all other related evidence.

7 MR. PASCRIKA: That's fine, your Honor.

8 MR. HALPERN: I drafted a motion for a mistrial. I
9 feel like I need to talk to Mr. Aguirre about whether he wants
08:09AM 10 me to file that or not.

11 THE COURT: All right. That's fine. I would expect
12 to deny it, but I'm certainly unhappy that I have to do this at
13 a minimum, but, in any event, that will be my working
14 assumption.

15 Third, length of the closings. I think, Mr. Halpern,
16 you thought you might need closer to an hour. Here's my plan.
17 I'm not going to cut anybody off if you're 45 minutes or an
18 hour. I'll begin clearing my throat at some point if you go
19 beyond an hour, and if I really think it's going too long, I'm
08:10AM 20 going to ask you to wrap it up.

21 I have no problem you targeting 45 minutes and lasting
22 an hour. If you target 45 minutes and wind up at two hours, we
23 have a problem, okay. I'm not going to cut anyone off
24 mid-sentence.

25 Again, there will be a brief opportunity, on the order

1 of, you know, three or four minutes for true rebuttal by the
2 prosecution. In terms of my jury charge, whether lunch
3 intervenes, whether I split my charge, which I could do, you
4 know, do the boilerplate first and the substantive later, if
5 that's the way it plays out, I'll wait and see, but one way or
6 the other, the jury will get the case today.

7 Anything else other than the instructions that we need
8 to talk about? I think we're in agreement who the alternates
9 are.

08:11AM 10 MR. PASCRIHA: Not from the government, your Honor.

11 MR. HALPERN: There was one exhibit addition. There
12 was -- so the shooting on April 16th, I had a disk with five
13 still shots, and they were introduced one-by-one. I can't
14 believe I put this folder somewhere. I don't know where I put
15 it. They were introduced one-by-one and given -- do you
16 remember the number?

17 THE CLERK: Yes, it's Exhibit 286, and it was
18 introduced into evidence as -- we introduced 286.1, 286.2,
19 286.3 and 286.4, but the disk contains five images.

08:12AM 20 MR. HALPERN: What happened as I was doing this, I
21 kept putting up the image. The jury saw them, I had asked him
22 some questions about them, when I got to the fifth image, I
23 showed it, I asked him about it, but I didn't say I'm offering
24 it.

25 THE COURT: Well, if the image is on 286, if 286 is a

1 disk containing five images --

2 MR. HALPERN: Yes.

3 THE COURT: -- it is in evidence, and you can talk
4 about it in the closing. In civil cases, lawyers constantly
5 introduce piles of evidence, leave them on the table and don't
6 show them to the jury and then mention them in their closing,
7 which has the jurors scratching their head like where did this
8 document come from. In any event, it's in evidence.

9 All right. Let's talk about the jury charge. First,
08:13AM 10 I want to apologize to everyone and your families. All of us
11 had to do some work over the weekend, which was basically, as
12 you know, a consequence of the government resting quicker than
13 anyone anticipated, which was good, but it required some effort
14 over the weekend, and I appreciate the fact that you all
15 responded yesterday, which was helpful to get me and my law
16 clerks thinking about it.

17 In no particular order, let me touch on some minor
18 things. Mr. Pasricha's e-mail yesterday indicated that I had
19 forgot to delete the reference to the indictment going to the
08:14AM 20 jury. That has been fixed and that some tinkering needed to be
21 done in reference to the unanimous verdict, which has been
22 done.

23 The conspiracy versus substantive crimes, as you know,
24 I have decided for -- well, I have decided that I am going to
25 use this example of a bank robbery to illustrate the difference

1 between conspiracy and substantive crimes because I think this
2 whole thing is so complicated, so convoluted that I think it
3 would help illustrate the point to the jury.

4 I have changed what is now page 25, I have somewhat
5 changed the hypothetical in response to the government's
6 concerns. I don't think anyone reading this who has not been
7 to law school would think that uh-huh, there must be an overt
8 act requirement for bank robbery conspiracy as opposed to
9 racketeering conspiracy, but I've changed it so the hypo now,
08:15AM 10 the three people agreeing to rob a bank instead of one
11 supplying a gun, it says one thinks up the plan, so making
12 clear you could be a co-conspirator without personally doing
13 anything overt, but I think that it's a useful thing to do
14 despite the limitations of any analogy, and so that's how I've
15 decided to handle that.

16 The government also expressed concern about the
17 conjunctive, disjunctive description of what the indictment
18 charges, and that was correct, it will be rephrased, it should
19 have been rephrased, which I think it is at page 30 of the
08:16AM 20 current draft.

21 Let me jump ahead over the state court murder issues.
22 I've come to that last. That's the most complicated and go to
23 the question of withdrawal and evidence of the defendant's
24 incarceration.

25 Here's my thinking on withdrawal. On the one hand, I

1 think that there is not sufficient evidence to support a
2 withdrawal instruction in the sense that I don't think the law,
3 as I understand it, requires the defendant to show affirmative
4 acts, either to defeat or disavow the purposes of the
5 conspiracy, simply refraining from continuing to participate or
6 being prevented from continuing to participate is not enough,
7 notwithstanding this one case in I think the Second Circuit,
8 which suggests otherwise. I don't think that's the law in the
9 First Circuit, and maybe that ought to be the end of the story.

08:17AM 10 The problem I have is this: If we're putting on
11 evidence about the murder of Katerin Gomez when the defendant
12 is in prison, and there's no specific evidence tieing him to
13 that particular episode, and Mr. Halpern defends on the ground,
14 well, no, you know, he was in, putting aside the facts of the
15 actual shooting himself, he was in prison at the time, he was
16 incarcerated, and he had no role in it, what is the jury
17 supposed to make of that?

18 I don't want the jury to think, for example, that that
19 means, ah, he couldn't possibly be guilty of a conspiracy if he
08:18AM 20 was incarcerated during the murder of Katerin Gomez, that's not
21 right. On the other hand, I can't state the law without
22 stating it completely and properly, and so all of that has led
23 me to this instruction so that they at least understand this is
24 what this means.

25 In other words, we didn't have to get into the murder

1 of Katerin Gomez necessarily. We did. Having done so, I think
2 I need to explain to them how that shooting and the defendant's
3 incarceration interact as a legal matter, which is what led me
4 to this instruction.

5 I've tweaked it slightly to add a sentence at the end
6 of the first paragraph on page 52: "However, even if a
7 defendant later withdraws from the conspiracy, he or she is
8 still guilty of the crime of conspiracy," and, of course, the
9 only thing it cuts off is responsibility for the later acts of
08:19AM 10 co-conspirators, so I don't have a perfect solution here, but
11 that's my thinking.

12 I do think I need to instruct on the fact that he was
13 incarcerated because it's, you know, a potentially powerful
14 fact, and I have trimmed this just on page 51, I have trimmed
15 this back somewhat, so I tell them what they cannot do with it
16 but don't suggest to them what they could do with it.

17 So comments, objections, thoughts on those two
18 instructions? Mr. Pasricha.

19 MR. PASRICHA: That works for the government, your
08:19AM 20 Honor, thank you.

21 THE COURT: Mr. Halpern.

22 MR. HALPERN: I'm not happy about the deletion of the
23 sentence of being able to take it into account in terms of --

24 THE COURT: Of course, you can argue that, yes.

25 All right. Let's talk about the substantive state law

1 instructions. Again, the framework here is peculiar, at least
2 to me, because we have had, for example, a conviction for a
3 lesser included offense in state court. Maybe that's not
4 technically relevant, but it seems to me in fairness somehow
5 ought to be, that, you know, if we're talking about what's
6 murder, then we ought to talk about what is not murder for what
7 it's worth.

8 I do think that it was appropriate to get rid of the
9 references to extreme atrocity and cruelty. I note on page 44,
08:20AM 10 there's still one in there. We're kind of doing this on the
11 fly, but all of that will come out. Malice is quite confusing
12 under state law because it has two definitions.

13 MR. HALPERN: Actually, more than that.

14 THE COURT: Well, anyway, here's what I want to do on
15 this state law piece of it generally, decide what is in or out
16 and then follow the pattern instruction, period. I feel
17 helpless.

18 MR. HALPERN: Can I address?

19 THE COURT: Yes.

08:21AM 20 MR. HALPERN: That's what I asked you to do, and I'm
21 saying this, I don't mean it to sound, you know, smart ass in
22 any way.

23 THE COURT: I can take it.

24 MR. HALPERN: This instruction on assault with intent
25 to murder, it's wrong, it's flat out wrong. You're referring

1 back to a prior malice instruction. The prior malice
2 instruction related to murder. There is no three-prong malice
3 requirement for either of these crimes, period.

4 THE COURT: I think it's the malice -- this says the
5 malice absence of mitigation, right, is this where we get into
6 if there's mitigation?

7 MR. HALPERN: Yes.

8 THE COURT: So it's a different malice.

9 MR. HALPERN: It's a different type of malice, and
08:22AM 10 there's no -- three-prong malice is unique to homicide, and
11 both -- you don't even get to the issue of mitigation on these
12 assault counts unless they find that he deliberately
13 subjectively intended to kill. Grievance, harm isn't enough,
14 reasonable person should have known that there was a
15 substantial risk of death isn't enough, it's a strict specific
16 intent requirement.

17 MR. PASCRIHA: Your Honor, I think it's just -- I
18 think the case law makes clear that's just another way to say
19 malice. I think they do interchangeably use malice for, you
08:22AM 20 know, absence of mitigation, as your Honor noted. We don't
21 have a strong preference, if it's easier to delete that third
22 element that the perpetrator acted with malice, that's fine. I
23 do want to address the extreme atrocity and cruelty issue.

24 THE COURT: Yes.

25 MR. PASCRIHA: We strongly believe that instruction

1 is appropriate, and here's why. The evidence here, part of the
2 reason your Honor is instructing them --

3 THE COURT: I thought you said at the end of last week
4 that you were prepared to drop that extreme atrocity or
5 Mr. MacKinlay, rather?

6 MR. PASCRIHA: I apologize if we did. I wasn't here
7 Friday. I guess at this point, we would ask if you're going
8 back in, in any event, to consider putting that in, and upon
9 reflection, the reason to do that is what your Honor is
08:23AM 10 instructing the jury is what categories count, what was the
11 plan.

12 This isn't about substantive offenses, what did they
13 want to do, what did they try to do, et cetera. Here, where
14 you've got evidence from witnesses saying they're trying to cut
15 people's heads off with machetes, they were trying to gut
16 people down the middle. What they were trying to do was murder
17 with extreme atrocity and cruelty. In fact, the most
18 compelling form of murder, as shown by the evidence, in terms
19 of their plan was not just premeditated murder but extreme
08:24AM 20 cruelty and atrocity.

21 The tapes you heard from co-conspirators when they're
22 outside Clacker's house, they're talking about gutting him
23 trying to slice his neck open. The plan really captures that
24 form of murder, so to the extent the goal of this is to show
25 what categories were they trying to do, we think it's essential

1 to give them that option because that's what the group was
2 trying to do.

3 THE COURT: Mr. Halpern.

4 MR. HALPERN: I think it's very clear under state law
5 that if people planned a murder and planned to torture somebody
6 but didn't do it, you could not be convicted of extreme
7 atrocity and cruelty. Extreme atrocity and cruelty under state
8 law isn't a theoretical construct, it's real, it had to have
9 happened, so even if they did plan to do that in a way that
08:25AM 10 would qualify, and I agree that, you know, there's evidence of
11 people talking about acting in ways that would satisfy that
12 standard.

13 It's not enough under state law, you can't have a
14 conspiracy to commit extreme atrocity and cruelty, you have to
15 actually do it.

16 THE COURT: You couldn't conspire, we're going to
17 kidnap my wife's boyfriend, and we're going to torture him,
18 that's the plan, and they have captured it all on tape, that's
19 not conspiracy?

08:25AM 20 MR. HALPERN: I don't think so. My -- I believe under
21 state law it's a crime that is based on what actually happened.
22 You have to be able to assess what happened to the victim and
23 how horrific it was. I don't think you can do it based on a
24 plan.

25 THE COURT: All right. Here's my reaction to that

1 without the benefit of further legal research. What the
2 government says sounds right to me. Mr. Halpern, if you're
3 right, I won't put it back in. We'll look for case law
4 supporting that. If you have something, you have about an
5 hour, we'll do the best we can, and, again, I'm going to
6 default to the pattern.

7 MR. PASCRIHA: That would include, your Honor, am I
8 correct, the parts of the pattern that talk about concepts,
9 such as the one concept being transferred intent, which I
08:26AM 10 believe your Honor in the current draft took from the pattern
11 and the second concept being, you known, duty to retreat or
12 self-defense, et cetera, would you be incorporating those
13 instructions from the pattern?

14 THE COURT: That's the plan, yes.

15 MR. PASCRIHA: Okay. Thank you.

16 THE COURT: All right. What else about the homicide,
17 Mr. Halpern, you wanted voluntary manslaughter as well as
18 involuntary manslaughter?

19 MR. HALPERN: I thought that on the Gomez homicide,
08:27AM 20 there's facts that would support it.

21 THE COURT: Remind me what voluntary is as opposed to
22 involuntary?

23 MR. HALPERN: So, essentially, it's the same scenario
24 as in the assault cases where you use mitigation to get to
25 assault to kill, you use mitigation in homicide to get from

1 second to manslaughter. So you could have an intentional
2 shooting, but if it was done as a result of imperfect
3 self-defense or heat of the moment or sudden combat, it could
4 knock it down to manslaughter, even if it's intentional, so,
5 you know, I think the threat posed by these Eastside gang kids
6 could have even if he deliberately -- I mean, my argument is,
7 frankly, going to be for the most part that he didn't intend to
8 shoot anybody, but even if he did, if they thought that it was
9 as a result of the threat, then that mitigation could trigger
08:28AM 10 voluntary manslaughter.

11 THE COURT: Mr. Pasricha.

12 MR. PASCRIHA: Your Honor, if you're going to include
13 categories, I think that's probably an interpretation supported
14 by the law or by the facts, so we don't really object to adding
15 that if that's what counsel requests.

16 THE COURT: Okay. Again, then my working assumption
17 will be I'll add that in, and it's going to follow the pattern.
18 The state pattern instructions are like 100 pages long, okay,
19 but -- you wonder why I want to have lunch in the middle of my
08:29AM 20 instructions here.

21 MR. HALPERN: So one of the things that I would
22 probably tell them, and then, you know, it raises an issue of
23 whether we want to add an instruction, suppose that there's no
24 specific intent that would satisfy either assault to murder or
25 assault to kill, it's still a crime. It's ABDW, it's

1 potentially aggravated ABDW with serious injury, so I just want
2 to make it clear to them, look, it's still a crime, it's just
3 not a crime that counts.

4 THE COURT: I guess the problem I have with that is we
5 could go all the way down to simple assault. There's hardly
6 never any end to that, which is why I was trying to draw the
7 line at what's homicide and not homicide, you know, or
8 attempted homicide.

9 MR. HALPERN: I don't feel like I need the
08:29AM 10 instruction, but I do certainly plan to tell them there is
11 another crime here, it's just not, you know, because they're
12 going to be thinking, well, wait a minute, if it's not that
13 assault and it's not that assault, does that mean it's nothing?
14 It's not nothing, it's a 20-year felony.

15 THE COURT: Well, I'm not going to let you talk about
16 the length of the punishment.

17 MR. HALPERN: Well, I won't say that.

18 THE COURT: All right. What else in these
19 instructions? The government had said they wanted me to talk
08:30AM 20 about simple robbery as opposed to armed robbery. The
21 indictment itself, if you look at page 18, paragraph 26, says,
22 you know, the pattern of racketeering activity consists of
23 multiple acts involving robbery, but then it says in violation
24 of Mass. General Laws, Chapter 265, Section 17, armed robbery,
25 Section 18, armed assault with intent to rob and in violation

1 of 274, Section 6, attempted robbery and Section 7, conspiracy
2 to rob.

3 So my take on that is that a simple robbery is not a
4 racketeering act, it has to be at least as charged in the
5 indictment. It could be, I think, but it's not --

6 MR. PASCRIHA: It was our understanding it is, your
7 Honor.

8 MR. MacKINLAY: Unarmed robbery, your Honor, under
9 state law is the same punishment as armed robbery, ironically.

08:31AM 10 THE COURT: Whatever the state law says, the question
11 is what does the indictment say? In other words, you could
12 have charged labor racketeering, but it's not in there, and so
13 I'm not going to instruct the jury on labor racketeering. The
14 indictment has to put them on notice what are the predicate
15 acts.

16 MR. PASCRIHA: Fair enough, your Honor, thank you.

17 THE COURT: What else about the charge? And, again,
18 just to be clear, what I'm going to do is reflecting this
19 discussion, we're going to go back using the royal "we," of
08:32AM 20 course, my law clerks are going to do the laboring oar here,
21 pull the laboring oar and circle back, you know, at some point,
22 you know, in an hour, hour and 15 minutes and tell you what I
23 think is my final decision.

24 You will have one more chance to convince me I haven't
25 got it right because we have a couple of hours to get these

1 things printed out and ready for the jury. They'll be nearly
2 final in about an hour.

3 Mr. Halpern.

4 MR. HALPERN: A few things. I think you had said
5 during the course the trial that you intended to give a
6 limiting instruction regarding medical records, but I don't
7 think you ever did.

8 THE COURT: Well, it wasn't requested. In other
9 words, this is the statement in the medical records, here's how
08:32AM 10 the attack happened, I put up my arm in self-defense, that
11 piece of it.

12 MR. HALPERN: It wasn't requested because you said you
13 were going to do it.

14 THE COURT: Well, it came in, I wasn't asked to, but I
15 can put that on my list of things to tell the jury, just to say
16 a caution.

17 MR. HALPERN: I do have concerns about the kind of the
18 limitations of the cooperating witness instruction because I
19 don't think that they would perceive, for example,
08:33AM 20 Vicky Martinez for -- well, Vicky Martinez in particular as a
21 cooperating witness, and, nonetheless, the immigration benefits
22 that she's receiving are enormous and probably --

23 THE COURT: Well, I've made a reference to immigration
24 matters, page 18.

25 MR. HALPERN: Oh, okay.

1 THE COURT: Sorry. I've added, The government may
2 give or promise different types of benefits to such persons,
3 including such things as assistance with immigration matters.

4 MR. HALPERN: Okay.

5 THE COURT: I'm actually specifically pointing to it.
6 I could go on say, you know, cash housing, new names or
7 whatever, but I think that's a fair inference.

8 MR. HALPERN: There's a couple of the RICO
9 instructions that I just want to, page 10 of my supplemental,
08:34AM 10 that sentence really comes straight out of your decision.

11 THE COURT: Now you're citing poor authority here.

12 MR. HALPERN: You quoted from the First Circuit that
13 there is a furtherance requirement, so I'd ask that that be put
14 in.

15 THE COURT: You're saying in addition to an intent to
16 agree, there has to be an intent to further the endeavor. What
17 does that mean in this context if there's no overt act
18 requirement?

19 MR. HALPERN: I think you have to participate. You
08:35AM 20 don't have to participate in the specific act, but you have to
21 participate in the enterprise in a way that furthers a
22 racketeering act, the possibility of a racketeering act
23 occurring.

24 I don't think it's just enough to be part of a group
25 in which you've entered into an agreement with the

1 understanding that somebody else is going to do something. You
2 have to agree to participate in some way.

3 THE COURT: All right. So, 10 people meet, the
4 government is capturing all this on a wire, and they all say,
5 all right, we're going to form an enterprise, and we're going
6 to affect interstate commerce, and we're going to commit
7 murders and armed robberies, and we're going to do at least two
8 of them, et cetera, et cetera, et cetera. They all shake
9 hands, they prick their fingers, they burn the cards with their
08:36AM 10 blood on it and so forth, the government then takes everything
11 down, they have not committed the crime of conspiracy you're
12 saying because there's been no furtherance, no one has done
13 anything to further?

14 Let the record reflect the defendant is now coming
15 into the courtroom.

16 MR. HALPERN: I think that's a tough hypothetical. I
17 think -- my reading of it is that if you had a guy who entered
18 into that type of agreement and then did absolutely nothing,
19 not only nothing related to the specific racketeering acts that
08:36AM 20 they're talking about but nothing to further the activities of
21 the group at all, he just watched. I don't think that's
22 enough.

23 I think you've got to at least plan to do something to
24 further the purpose of the enterprise, otherwise I don't
25 understand what that sentence means. What does it mean -- it

1 doesn't say you have to further, it says you have to intend to
2 further, so in your analogy, I suppose the explanation would
3 be, well, the government arrested him, so he didn't ever
4 actually ever do anything to further, but he intended to, and
5 here's what he intended to. I think you've got to intend to do
6 something other than just show up.

7 THE COURT: Mr. Pasricha.

8 MR. PASCRIHA: Your Honor, we'd object to that. I
9 think it adds a layer of confusion. I think part of your
10 instruction, and I forget what page it is, but part of the
11 things you're going to instruct them on is a conspiracy is
12 complete and the crimes occurred at the time the agreement is
13 reached.

14 Instructing them on that point, which is correct, and
15 then and if adding in this layer of but you've got to do
16 something in furtherance, I don't think it adds any clarity, I
17 don't think it's necessarily required by the law, and I think
18 it would add confusion more than anything else, so we'd object
19 to that requirement at least as requested.

08:38AM 20 And I think we'd further object just in terms of what
21 counsel can argue on this point. Our concern would be if you
22 give some type of instruction like that, I don't think it would
23 be fair argument to stand up and then say, well, let's look at
24 each of these acts. He didn't do anything in furtherance of
25 whatever X act, and, therefore, when the Judge tells you

1 there's this furtherance requirement, he didn't further this
2 particular murder, and so, you know, he's not guilty. I think
3 it invites that kind of argument, which I think would be
4 improper.

5 THE COURT: All right. I'm not going to give the
6 requested instructions for better or for worse. I think that's
7 language that is perhaps a little bit looser than it needs to
8 be, that is, the language from my decision and from the
9 appellate court, so I'm not going to give the decision.

08:39AM 10 Mr. Halpern.

11 MR. HALPERN: Page 13, Number 11.

12 THE COURT: I'm sorry, is this of your --

13 MR. HALPERN: Yes, my supplemental.

14 THE COURT: Your supplemental.

15 MR. HALPERN: So I think that everything in these two
16 paragraphs comes out of the materials I've cited, and I think
17 most of it comes out of those two First Circuit decisions. I
18 know you put in a sentence that characterizes some of this, but
19 I'd ask that this all go in. It's right out of the case. I
08:39AM 20 think it's an important explanation of the difference between
21 random events and continuing activity.

22 THE COURT: All right. This is in my current draft,
23 that's at page 35, and what we're talking about here is the
24 relatedness requirement and the threat of continued criminal
25 activity requirement.

1 You know, appellate decisions sometimes phrase things
2 in slightly different ways with the same concept. I think that
3 is what is going on here. I use the word "disconnected" twice
4 at page 35. A series of disconnected crimes is not a pattern,
5 and nowhere is it continued racketeering activity, so I think
6 that the essence of the *Ramirez-Rivera* language is very clearly
7 captured in my instruction, page 35.

8 MR. HALPERN: Thank you. That's it.

9 THE COURT: Anything further from the government?

08:40AM 10 MR. PASCRIHA: Nothing further, your Honor.

11 THE COURT: All right. Why don't we reconvene in
12 about an hour. I'll redistribute a new version of this, and
13 then we can talk about, you know, whether there's any
14 additional things that need to be done. You are going to
15 confer with your client about whether you want to move for a
16 mistrial on the robbery issue.

17 Are you going to close for the government?

18 MR. PASCRIHA: I believe Mr. MacKinlay will do the
19 closing, I'll do the rebuttal.

08:41AM 20 THE COURT: Okay. Let's see if we can't get that
21 screen pulled up.

22 THE CLERK: All rise. If I have this thing done
23 earlier, we'll bring it into the courtroom and you can look at
24 it.

25 MR. PASCRIHA: Thank you, your Honor.

1 THE CLERK: All rise.

2 (A recess was taken.)

3 THE CLERK: All rise. Thank you. You may be seated.
4 Court is now back in session.

5 THE COURT: All right. I'm circulating to you the
6 redraft of the jury instructions, a couple quick points. First
7 off, on the question of extreme atrocity or cruelty, one of the
8 peculiar -- first off, we didn't find any case along the lines
9 identified by Mr. Halpern, and because this involves a
09:52AM 10 conspiracy to commit murder by definition, if that's true, it's
11 premeditated, and so conceptually it's a little difficult to
12 see here how you would have a conspiracy to commit a murder
13 with extreme atrocity or cruelty that was also not a
14 premeditation murder.

15 In any event, I've decided to put it in and just
16 follow the pattern instructions for what it's worth, so it's
17 back in. I think the business about malice that the defense
18 complained about is out. We have included voluntary
19 manslaughter as well as involuntary manslaughter. I think
09:53AM 20 those are the greatest hits.

21 I have the formal motion for a mistrial, which I will
22 deny, but I'll wait for the defendant to be in the courtroom
23 before I do that. Just to be clear, because we have a couple
24 hours as a practical matter, well, maybe it depends on how long
25 your closings are, we are going to have to photocopy and staple

1 on the order of 25 or 30 of these things, so we can't wait till
2 literally at the last second, but if you're sitting at the
3 table and you see something, it is still correctible, you may
4 not convince me, but it is still correctible, and we're still
5 scrubbing it for typos as well if you see any of those, let me
6 know as well. Mr. Halpern. I'm sorry.

7 MR. HALPERN: No, I was just cleaning up.

8 THE COURT: Oh, Mr. Halpern, for what it's worth, and
9 I've left it in, if you look at page 39, the last sentence, the
09:54AM 10 original draft, and I've left it in, we're talking about
11 whether the defendant must personally commit or agree to commit
12 the two racketeering acts, however, the government must prove
13 that the defendant intended to further an endeavor that would
14 satisfy or actually did satisfy the requirement of a pattern of
15 racketeering activity. It may be somewhat confusing, but I'm
16 leaving that in.

17 All right. The defendant is back in the courtroom.
18 The defendant has moved for a mistrial based on the admission
19 of the Irwin Martinez evidence, which I've read. I'm going to
09:55AM 20 deny that motion, but I am going to instruct the jury that they
21 are to disregard that evidence in its entirety and to give it
22 no consideration and to not speculate as to what other evidence
23 might have been or the reasons for me striking it. That's how
24 I'll handle that. Mr. Halpern.

25 MR. HALPERN: I just request that exhibits that

1 related to Martinez be maintained as part of the record.

2 THE COURT: Maintained as part of the record?

3 MR. HALPERN: Yes.

4 THE COURT: Yes, of course. But just to be clear,
5 because I'm going to strike them, let me make clear what I'm
6 going to strike. According to my records, I have 122 through
7 126 inclusive.

8 THE CLERK: I have 121 also.

9 THE COURT: 121 was the map. Yes, I'm sorry, 121
09:56AM 10 through 126 inclusive.

11 THE CLERK: Those exhibits have been removed from JERS
12 as well as the hard copy.

13 THE COURT: They will not go to the jury either in
14 hard copy or electronically. They will be struck, but, of
15 course, they will be kept as part of the record in the case.

16 MR. HALPERN: I don't know that I want to do this, but
17 I'd be interested if it becomes an issue. Would you have an
18 issue if I referred to that evidence in the closing?

19 THE COURT: Yes.

09:56AM 20 MR. HALPERN: In the sense of --

21 THE COURT: It's not part of the case. You asked me
22 to strike it, and I've struck it. It's out. It's going to
23 confuse them.

24 MR. HALPERN: I think the argument would be that they
25 were shown evidence that they had no connection to MS-13.

1 THE COURT: If you make that argument, I think
2 fairness would require the government to be able to respond why
3 they were shown that evidence, and I don't think that's fair.
4 I think we were still missing a couple jurors.

5 THE CLERK: He actually gave me the thumb's up.

6 THE COURT: Everybody is here. Do you want to get
7 everybody lined up. It's about four minutes to ten. Are you
8 ready to go?

9 MR. MacKINLAY: That's fine.

09:57AM 10 THE COURT: Mr. Halpern, are you ready to go?

11 MR. HALPERN: Yes. We have to introduce that
12 stipulation.

13 THE COURT: We have to do the stipulation, let me pull
14 my notes here, the instruction on Irwin Martinez. I'm going to
15 give the cautionary instruction on the medical records, and
16 then we'll get into the closings. Actually, why don't you
17 remain seated, Mr. MacKinlay, while the jury comes in.

18 THE CLERK: All rise for the jury.

19 (JURORS ENTERED THE COURTROOM.)

10:00AM 20 THE COURT: All right. Ladies and gentlemen, welcome
21 back. I appreciate your cooperation in starting a little bit
22 late. It allowed us to do everything we needed to do to get
23 ready for today.

24 We have three items of business, the first is I think
25 that there is a stipulation that the defense wishes to

1 introduce.

2 MR. HALPERN: Yes.

3 THE COURT: Mr. Halpern.

4 MR. HALPERN: The parties stipulate that in a
5 report --

6 THE COURT: Can I just explain "stipulation" is a
7 legal word meaning an agreement, the parties agree that these
8 facts are true. I'm sorry, go ahead.

9 MR. HALPERN: "The parties stipulate that in a report
10:01AM 10 prepared on April 23, 2015, summarizing an April 21, 2015
11 interview of Christian Henriquez, with respect to Henriquez'
12 statements concerning a plan to murder him, a law enforcement
13 agent wrote, Henriquez believes that MS-13 Los Enfermos want to
14 murder him because they think he snitched on Little Crazy or
15 Tremendo."

16 "Approximately one month ago, Roca told him that he,
17 Roca, did not want to kill Henriquez because he knew that
18 Henriquez was innocent of being an informant. Roca only wanted
19 to warn Henriquez that he was in danger of being killed. Roca
10:02AM 20 told Henriquez that Big Crazy told him that Henriquez had
21 snitched on Little Crazy and Tremendo. Roca said that Big
22 Crazy gave the order to kill Henriquez."

23 I'm offering this as Exhibit 292.

24 THE COURT: All right. It's admitted, Exhibit 292.

25 (Exhibit No. 292 received into evidence.)

1 THE COURT: All right. That's the first thing we need
2 to do. The second thing is medical records from Mass. General
3 Hospital or the Mass. General system had been admitted as
4 Exhibit 117. This concerns Christian Carillo who testified
5 that he had been attacked with a machete. The medical records
6 include what Mr. Carillo told his healthcare providers what
7 happened, and I'm going to ask you, I'm going to instruct you
8 that you may consider that only for the purpose that that's
9 what he said to the doctors and nurses, this is what happened
10:03AM 10 to me but not as a description that you may consider as to what
11 happened.

12 In other words, the first question a nurse or doctor
13 often says is what happened, and the person responds, and it's
14 not sworn testimony as to exactly how things unfolded, it was
15 made for the purposes of medical treatment, and you can
16 consider it only for that purpose, and I think that's
17 Exhibit 117. That's the second thing to do, that I wanted to
18 accomplish.

19 The third is the following: There was testimony by
10:04AM 20 Irwin Martinez. He testified in substance that he had been
21 robbed, he was outside sitting on the porch looking at his
22 phone and that he had been robbed on April 9th, 2014, and there
23 were some exhibits that came with that, Exhibits 121 through
24 126, a video and a map and so forth.

25 I'm striking all of that evidence from the record, so

1 you are to disregard it completely. You should not speculate
2 as to why I'm striking it, what the evidence showed or didn't
3 show, and it should form no part of your consideration of this
4 case directly or indirectly. Again, I'm striking it, and you
5 are to disregard it. That's the testimony of Irwin Martinez
6 and Exhibits 121 through 126, which you will not have with you
7 in the jury room because I've struck them. That brings us, I
8 think, to the closing arguments.

9 Again, the government is going to go first followed by
10:05AM 10 the defense followed by very brief opportunity for rebuttal
11 argument by the government and then my instructions to you,
12 which will be in writing, and I will read aloud. I don't know
13 quite what breaks we're going to take and when because I don't
14 know how it's going to unfold, so we'll see how it goes.

15 All right. Mr. MacKinlay, are you ready?

16 MR. MacKINLAY: Yes, your Honor, thank you.

17 CLOSING ARGUMENT

18 MR. MacKINLAY: Tremendo brought a rain of error to
19 the City of Chelsea. He joined MS-13 with a fundamental tenet,
10:06AM 20 a fundamental requirement of killing rivals. The evidence that
21 you heard over the past several weeks demonstrates that he's
22 guilty of the charge of racketeering conspiracy. Indeed, he
23 was guilty of the charge of racketeering conspiracy before the
24 wheels of his plane touched down in the State of Massachusetts.

25 What do I mean by that? Well, remember the testimony

1 when he was in Michigan before he came here, and he was
2 organizing the gang. He made plans, he made recruitment
3 videos, held meetings over the telephone. Did the actions, did
4 the activities acted and through his words in a manner that
5 demonstrated that he was joining a conspiracy and all those
6 things that were to further the conspiracy? He brought with
7 him, as you heard, reinforcements, in the form of people that
8 came with him on the plane, Bravo, Gallito, members of the gang
9 that came with him to help build up, to help activate, to help
10:07AM 10 develop, make it into the biggest gang in the country was the
11 testimony.

12 We put additional evidence before you besides just the
13 information from Vicky Martinez and others that occurred in
14 Michigan. Why? Why did we spend so much time parading
15 witnesses here and bringing evidence before you? Conspiracy in
16 action, members of the jury, conspiracy in action. We wanted
17 you to see what actions he was doing after the fact, and others
18 were doing at his behest in his gang that demonstrated his
19 intent to be a part of the MS-13 conspiracy.

10:08AM 20 That's why we brought you additional evidence,
21 evidence to prove to you that the agreement, and that's what
22 this is about, an agreement, an agreement by the defendant.
23 That's the crime.

24 I am not the Judge, obviously. Judge Saylor will
25 instruct you on the law. Anything that I say that differs from

1 what he's going to say, obviously, listen to him, but an
2 agreement is a shared understanding of the crime, simply put, a
3 shared understanding of the crime, simply put, simply stated,
4 an understanding.

5 What else do we have to prove? What's a conspiracy?
6 Briefly stated, again, the Court will provide you much more
7 detailed instructions at the conclusion, but a conspiracy is
8 complete, and the crime is committed when the agreement occurs.
9 There's no requirement of demonstrating that the conspiracy was
10:09AM 10 actually successful or it was completed because it's the
11 agreement to join that constitutes the crime.

12 Now, again, briefly what conspiracy? Conspiracy to do
13 what? The defendant and the evidence will establish that the
14 defendant joined the MS-13 conspiracy that involved some member
15 of MS-13 committing two or more racketeering acts.

16 We don't even have to prove that he committed the
17 racketeering acts or that he even agreed to commit two
18 racketeering acts. Agreement that some member, agreement to
19 join a conspiracy that some member would do that, and the Judge
10:10AM 20 will provide you a list of the racketeering acts we've alleged,
21 and you can rest assured that committing murder, conspiracy to
22 commit murder, robberies are some of those charges.

23 Before we move to some of the other areas in terms of
24 the more challenging issues that are presented in terms of the
25 law, I want to take at least three areas at the outset that I

1 think are pretty simply understood. The evidence, likewise,
2 supports, the abundance of evidence, supports them in the same
3 manner as the elements that we just discussed. The elements
4 are just what we need to prove in terms of establishing the
5 crime.

6 The first one is "enterprise." What's the enterprise?
7 The enterprise, quite simply, is MS-13. The enterprise is the
8 gang that you heard about from everybody from Claudia Saa at
9 the beginning of the case, Jeff Woods at the beginning of the
10:11AM 10 case, through and including Vicky Martinez and Clacker,
11 Christian Henriquez.

12 MS-13. You remember the description provided by
13 Claudia Saa about the NFL. Do you remember that, how the NFL
14 is like MS-13, and the East Coast Program and the West Coast
15 Program were like the conferences, AFC and NFC. Within the
16 conferences are the teams, those are the cliques. You remember
17 that. Well, the enterprise is the NFL. It's MS-13. It's not
18 one of the teams, one of the cliques. It's not merely ECS,
19 Enfermos clique in Chelsea, it's the whole of MS-13.

10:11AM 20 So what are the indicia of those types of MS-13, and
21 why is it the evidence establishes that MS-13 is the
22 enterprise? You know the indicia, it was the colors they wore,
23 the structure they had. There's a choice of weapons, being
24 machetes, the structure being a leader in El Salvador, an East
25 Coast leader in Virginia, and then all the cliques in

1 Massachusetts. Do you remember that?

2 The scope of the enterprise is not just the local
3 group though, it's the entire scope of MS-13. That's the
4 enterprise, the whole NFL.

5 Do you remember I showed you one of the recordings
6 that we had, the transcript that we played for you, and the
7 transcript was read to you. We read the transcript. I know
8 this was certainly early on in the trial. Sugar, you may
9 recall, was the leader of the ECS clique in El Salvador.

10:13AM 10 What does he say in one of the recordings of the
11 meeting in Virginia, the transcript to which an excerpt you
12 have before you now. "Let's all work together. This is my
13 turf. We all represent Mara Salvatrucha." Isn't he telling
14 you what the enterprise is? Isn't he telling you that it's the
15 whole of MS-13?

16 More locally in Massachusetts, you have evidence from
17 Clacker, Christian Henriquez, in which my Brother counsel
18 showed him a series of photographs, took him a pretty lengthy
19 period of time because he went through a whole stack of them,
10:13AM 20 marked them, and you have them as exhibits in the case, but
21 those are some of the people that are involved here in
22 Massachusetts, those that he identified in their actual
23 positions in their respective cliques. You can see all the
24 various cliques and all the people that he identified that he
25 has personal knowledge are involved in MS-13 in Massachusetts,

1 a variety of cliques.

2 He gave some of their -- I believe he gave all of
3 their positions, a number of them homeboys. You remember from
4 the structure discussions over and over again. In fact, I
5 think even Sugar described in one of the calls, in the
6 transcripts of the recordings: "Paro," "chequeo," "homeboy."
7 How you move up? Violence. How do you get to be a homeboy?
8 Killing.

9 A number of these people, they're identified by
10:14AM 10 Christian Henriquez are homeboys. These are people that
11 defendant joined a conspiracy with. In addition to the people
12 that were identified by Clacker, he also testified there was
13 over 100 MS-13 gang members in Massachusetts through a variety
14 of cliques.

15 How do those cliques act? Like brothers. It's like a
16 brotherhood. They're all in it together, common purpose,
17 common goal, everybody kill the rivals, and what cliques have
18 been identified for you by other evidence? They're listed
19 here. There's eight of them. Enfermos Criminales Salvatrucha
10:15AM 20 is just one of them. All of the cliques are part of MS-13, all
21 of them are part of the conspiracy that the defendant joined.
22 All of them are available with people that could have
23 committed, were agreeing that were committing two or more acts
24 on behalf of MS-13.

25 Beyond the cliques statewide, you also know about ECS,

1 Enfermos Criminales with Tremendo at the top as the leader, but
2 the others, you've heard their names, you've seen them in
3 transcripts as well throughout the trial. They're all members
4 of the clique as well, and they are all, according to the tapes
5 included, each one of them tied in as members through
6 cooperators' testimony and the testimony of Vicky Martinez, the
7 testimony of Christian Henriquez, documentary evidence. Many
8 are recorded indicating and conducting the MS-13 activities.
9 This is still part of the enterprise, all the way down to the
10:17AM 10 group in ECS. Make no mistake, that's not limited to that
11 group in terms of the enterprise.

12 This is, as you may recall, an MS-13 book that was
13 recovered during the search following Daniel Menjivar's arrest,
14 and it included inside of it certain notations that referenced
15 interesting information showing membership and showing the
16 involvement of the enterprise locally.

17 It shows the names. Do you remember Christian
18 Henriquez went through the names, Cuervo, Primen was Villano
19 and so forth, Clacker, Roca, and there's two additional names
10:17AM 20 on the second half, the bottom half, which reflects money or
21 dues that were collected to be paid to support weapons locally
22 and to pay back to El Salvador, the dues that were owed back to
23 the clique.

24 But this document also clearly establishes that these
25 people are part of the enterprise all the way down to the

1 people that were in Chelsea, but, interestingly, the two
2 reinforcements, the two soldiers, Roca, Gallito and Bravo that
3 ended up coming along with him are also referenced there as
4 well.

5 The next issue that we can deal with I think fairly
6 simply is membership, and I would put it to you like this. Was
7 there any evidence whatsoever that Tremendo was not involved as
8 an MS-13 gang member, that he was not the leader of the ECS
9 clique locally? Of course not.

10:18AM 10 Over and over you heard it, in fact, you heard, you've
11 seen his tattoos, you've heard about them, you've seen about
12 the YouTubes that he produced, you heard them, violent-laden,
13 scary images. He produced them. He announced, he advertised
14 himself as being a leader of the gang, but there's more than
15 that.

16 Vicky Martinez also indicated that he's a member,
17 Clacker, and she indicated that he was the word, and you heard
18 what the word is, the first word or the word, "leader." What
19 does the word mean? The boss. Not just Vicky Martinez saying
10:19AM 20 what the word is, you heard from Claudia Saa, and you heard
21 from Jeff Wood, that's who runs the clique, he was the word.
22 He was the boss of the clique according to Clacker as well, so
23 there can be no doubt that he was the leader and a member as
24 such of MS-13.

25 But in addition to being the leader and having the

1 title, tattoo, control that's associated with it, he gave out
2 orders, he told people what to do, he announced his presence
3 and his purpose, even at crime scenes.

4 We'll talk about these later, more specifically, "But
5 I am Tremendo from Enfermos Criminales." That was the time
6 when he struck Christian Carillo in the head with the machete
7 moments before that. That was the testimony of Vicky Martinez.

8 What did he say when he was shooting at
9 Javier Servellon? Again, "La Mara," announcing his presence,
10:21AM 10 he's told you, "I'm MS-13," at the scenes of incidents, in
11 addition to having the tattoo, and in addition to his mother of
12 his child saying, in addition to one of his fellow gang members
13 saying it.

14 The third area that I want to move through, again,
15 relatively simply will be interstate commerce requirement.
16 Now, the Judge, again, will instruct on the law relative to
17 this, but I would suggest it's a minimal effect is required,
18 very minimal effect.

19 We did not rely on minimal effect. In fact, we proved
10:21AM 20 that interstate commerce was affected by the affairs of the
21 enterprise in four ways, through four groups of evidence. The
22 first was travel. You remember Vicky Martinez. She testified
23 how they rode on the top of a train in El Salvador to Texas
24 before being arrested, crossing the international line, the
25 border, that he was MS-13 beforehand, and eventually he was

1 being directed by the gang to come to Chelsea to set up shop,
2 right, to build up the clique because there was a lot of
3 presence here, because 18th Street was too strong here,
4 international travel by both of them, interstate travel.

5 How so? Well, the defendant's own records indicate
6 that Tremendo along with Vicky and two other individuals was
7 reinforcement. Gallito and Bravo also flew here at the same
8 time traveling across state lines, obviously, in an airplane.
9 We talked about it briefly earlier.

10:22AM 10 In addition to the travel of these individuals, which
11 in and of itself meets the requirement, there's also you
12 remember conversations with via the Internet. I'm not sure it
13 was Skype or one of the other Internet, Facetime-Type devices
14 where they had conversations via the Internet realtime with
15 people outside the state, gang leaders in Virginia and overseas
16 in El Salvador. Again, those conversations also meet the
17 interstate commerce requirement.

18 Third, telephone calls. You heard testimony from
19 Vicky Martinez as well that there were phone calls where
10:23AM 20 meetings were conducted via the telephone, another way, both
21 internationally with Sugar and with Bunker, who were the
22 leaders in El Salvador, as well as in Virginia. That's the
23 third way.

24 The fourth way is the firearms. You heard from
25 Special Agent Mattheu Kelsch from the ATF, who examined these

1 three firearms that we marked previously as exhibits, and
2 indicated based on his training and experience that each was
3 manufactured outside of the State of Massachusetts. More
4 specifically, the Beretta was made in Italy, and the other .22s
5 were made in Tennessee and New York, respectfully, and,
6 therefore, since they were being manufactured outside of
7 Massachusetts, they had to have crossed state lines before they
8 were recovered here at the crime scenes, at the destroyer house
9 for one of them in Revere, at the shooting scene of Dennis
10 Perdoma Rodrigues for the second one and in the backpack worn
11 by the defendant. Again, each one is a firearm in the opinion
12 of the ATF agent, moreover, each traveled in interstate
13 commerce by being manufactured outside Massachusetts.

14 A little bit about government witnesses. You heard
15 from Vicky Martinez. I've referred to her a couple of times.
16 You heard from Clacker, Christian Henriquez. Quite a long
17 testimony between the two of them. But there's multiple ways,
18 at least four ways that I'm going to suggest, submit that you
19 can find based on your assessment of their testimony that
20 they're credible.

21 The first, did you notice that they corroborated each
22 other? In other words, they said things, each one said
23 something, and the other one said something that was remarkably
24 similar. That's how they corroborated each other. For
25 example, didn't they both tell you, if you have a memory of

1 their testimony, that controls, but think about it. Didn't
2 they both say that he, Tremendo, was coming to Massachusetts to
3 set up the clique, to recruit more members, to activate the
4 clique because there were more targets here, to ramp up the
5 efforts, to build up MS-13? Didn't they both say that? Did
6 you hear any evidence that they knew each other were
7 corroborating and helping the government? Nothing.

8 Does it have a ring of truth to you when two people
9 give the same account of an incident? I would submit that you
10:26AM 10 could find that it does have a ring of truth. They corroborate
11 each other.

12 Second way, courtroom demeanor. Again, when we talk
13 to people every day, every day of your life, you bring your
14 common sense and your life experiences into play. What do I
15 mean by that? You size people up. What do they look like, how
16 do they act? Are they evasive? Do they answer the question?
17 Do they try to add things in? Do they try to keep things back?
18 Did you see any of that in the courtroom demeanor of
19 Vicky Martinez? If you did, take it into account.

10:26AM 20 Did you see any of that in the testimony of
21 Christian Henriquez? Again, I submit that you could find that
22 they were credible based upon the way they handled their
23 questions, their responsiveness to the questions and the way
24 that they conducted themselves here in the courtroom.

25 The third way, the circumstances. Now, what do I mean

1 by that? Christian Henriquez, did he start talking because of
2 a problem that he had, an arrest, anything of that nature? No,
3 he started cooperating because they were going to kill him. He
4 was told that he was going to be killed, he checked it out,
5 find out he believed it to be true and then became a part of
6 the government's case, not before.

7 The circumstances of his coming on board to testify
8 against the leader of this gang demonstrate, I would submit to
9 you, that you could find them to be a credible piece of
10:28AM 10 evidence to support his testimony.

11 Now, what's this about benefits he received?
12 Benefits. Benefits? Witness protection is a benefit? No,
13 that's just to keep him alive, keep him safe. Money expended.
14 What cost, at what cost the value and the cost of human lives
15 lost in the investigation and the cost of those people who were
16 attacked and suffered injuries, but, yes, the government spent
17 money to support and keep him safe. But how much money went
18 into his pocket as income? Nothing. Nothing. He had to move,
19 uproot his whole life and move away, never talk to his friends
10:28AM 20 again, move on, disappear.

21 What about Vicky Martinez? What's the circumstances
22 of her testimony that came to life to be brought in here before
23 you? Well, to be clear, I think the testimony you remember
24 will be she didn't ask for anything. She didn't ask for
25 anything. Her testimony was, no, I didn't ask for any

1 immigration benefits. I didn't ask not to be prosecuted, I
2 didn't ask for anything, I decided to come here.

3 Again, she indicated she was afraid and she needed to
4 be subpoenaed or compelled to come here, but the circumstances
5 of her coming to light and coming to this court warrant
6 consideration by you in terms of assessing her credibility.

7 The final point of the corroboration, assessing the
8 credibility of these two people would be this: What did the
9 gang itself think of this? What did they view the people like
10 Vicky Martinez and Christian Henriquez?

11 Well, Sugar makes it pretty clear, he's worried about
12 the FBI getting involved with them, giving them money to loosen
13 their tongues, not to get them to lie, get them to talk because
14 they know what's going to happen if they talk.

15 Even the leader of the gang in El Salvador
16 acknowledges that people come in here and testify, they'd be in
17 a position to sink them. Also, what about the local group?
18 What about the local clique? How about Roca and Chucky? What
19 did they say on a recorded meeting on April 21st? Again, we
20 read this portion to you, and we also recorded it during the
21 opening, but he could wind up harming a great many people.
22 Chucky, he could sweep all of Chelsea, the whole structure,
23 he'll finish us all off.

24 Did they say because he's going to lie and make stuff
25 up about all this? No. He knows what happened here, and if we

1 don't kill him, he's going to tell someone like you guys about
2 it. The gang itself in El Salvador, the gang itself here both
3 feared that this man would destroy the whole structure, the
4 whole enterprise locally of MS-13.

5 They pulled out all stops on him by putting a green
6 light on him. What are the goals of MS-13? Simply stated, the
7 goals of MS-13 are to kill rival gang members. You heard it
8 over and over again. You heard it from Clacker. It's always
9 the same, kill other people from the other gangs, 18th Street
10:31AM 10 and other rival gangs.

11 You heard it from Claudia Saa. That's the ultimate
12 for them. They wanted to use violence at every level because
13 they want to kill the rival gang members. That's what they do.
14 Clacker said the same thing. Vicky Martinez, Clacker both said
15 the same thing, that they wanted to identify and kill chavalas.
16 Over and over again, you heard the same theme. That's one of
17 the goals, that's one of the fundamental parts of the gang,
18 kill the rivals, the gang and the conspiracy that he joined.

19 Jeffrey Wood indicated based on his investigation here
10:32AM 20 and his personal knowledge that the goals are to eliminate the
21 rivals, "disappear the rivals" I believe was used by one of the
22 witnesses. I believe it was Clacker.

23 In the meetings, they discussed just that, they
24 discussed who the rivals are and how they're going to kill
25 them. Now, if that sounds an awful lot like the conspiracy to

1 commit murder, it is. We'll come back to that later, but along
2 the way, some of these things we're talking about are going to
3 meet -- what the Judge is going to instruct you on are acts
4 that constitute proper racketeering acts. Conspiracy to commit
5 murder is clearly one of them.

6 At these meetings, they discussed that they shared
7 photographs. They also identified through Facebook pictures,
8 you remember this, that's how they would know what to do, where
9 to go and find someone. They would search through different
10 means to do that.

11 You remember hearing the multiple means of going out
12 and addressing the rivals. Sometimes they staked them out, the
13 place where they might be. Sometimes when they're on patrol,
14 "missions," I think maybe was the word that was used, put them
15 in the general area. Other times, you heard about luring,
16 "catfishing" was the term used. Do you remember that? That
17 really horrible practice of tricking someone into thinking
18 they're meeting someone when, in fact, they are not and then
19 attacking them. Three means that they used to conspire, attack
20 and kill rivals.

21 What about the murders? Perfect time for me to circle
22 back and say, again, we're not required to prove that the
23 murders actually occurred, just there was an agreement to do
24 that.

25 Counsel raised in the opening statement, "Where are

1 the bodies?" "Where are the bodies?" You heard testimony
2 about six people in this aspect of the investigation that were
3 killed during MS-13 attacks. Javier Ortiz, Wilson Martinez,
4 18th Street, Irvin De Paz, 18th Street, Christofer De La Cruz,
5 18th Street, Jose Aguilar Villaneuva, MS-13, and Katerin Gomez,
6 an innocent bystander for a shooting incident involving
7 Eastside gang. That's where they are. There's where the
8 victims are. And there's the situations that got them where
9 they are. In the case of Katerin Gomez, being at the wrong
10:35AM 10 place at the wrong time.

11 I do want to talk a little bit about the Katerin Gomez
12 murder because we provided a summary presentation. One
13 witness, excuse me, I think we provided two witnesses.
14 Genevieve Gibbons, remember the state trooper who testified
15 that she went to the scene and what she did in the aftermath.
16 And then you heard, I believe, from Dontae Hart afterwards.

17 But you also heard from Clacker. He said that Cuervo
18 was trying to shoot at the Eastside gang members and missed and
19 hit the woman in the window. There was an argument out front,
10:35AM 20 she went to the window, she was struck by a rival bullet that
21 was aimed at the rival person.

22 She also, in addition to that, Clacker also said that
23 he knew that they were there to kill rivals that day. With
24 this one, we don't need to rely on Clacker exclusively because
25 you have the iPhone of Cuervo and the message of Cuervo, an

1 excerpt of which is right here.

2 This was just a mere, again, seven or eight hours, I
3 think it was like 3:30 in the afternoon, that she was killed
4 just after midnight when she went to the window and the bullet
5 came through, you remember this, this was just Friday,
6 Thursday.

7 What did Cuervo tell you about the malice in his heart
8 on that day before he went out there? He's looking for
9 homeboys, paying out and shooting with 13 bullets. He's
10:36AM 10 hanging with his home boys, he's looking for the rivals, they
11 are greeting homeboys, making a presence felt in the area.
12 He's going there to look for the rivals from the Eastside gang.
13 He finds them. He armed himself with a gun. He loaded the
14 gun. He went to that location, and he mistakenly fired the
15 gun? Come on, come on. You know better than that.

16 Dontae Hart says, yeah, they were rivals, Eastside
17 gang was rivals. He saw Alex Rodriguez three feet away at the
18 time, approximately. Remember, I stood somewhere around here.
19 I don't remember exactly where I stood, but do you remember he
10:37AM 20 gave an estimate how close the person was to Cuervo at the time
21 that he fired the shot, and he estimated around three feet.

22 But he said he's advancing, advancing, retreating,
23 running away, calling for help, nothing. He's advancing,
24 Cuervo is, and you can see that on the video that he's
25 advancing. When he comes up on the video and he raises his arm

1 afterwards and tries, at least points his weapon as they run
2 away.

3 That, members of the jury, is transferred intent
4 theory of first-degree murder that you're going to hear. He
5 fired the gun at one person that he intended to kill
6 demonstrated by his malice in his heart of bringing a loaded
7 gun to that location, demonstrated by raising the weapon,
8 pointing it and firing it. That's transferred intent. He
9 intended to kill one person, the bullet missed and hit
10:38AM 10 Katerin Gomez and took her life.

11 What did the defendant's witness add to this?
12 Nothing. Nothing. Why? The defense witness was on the wrong
13 premise. He premised that your bullet goes where you point it.
14 I guess if you're an expert marksman, that might be the case,
15 but also use your common sense and life experiences in terms of
16 what you have seen and what you have learned. Which direction
17 does the firearm kick when it's fired? He shot at one person,
18 he killed another, that's transferred intent murder. That's
19 what happened with Katerin Gomez.

10:38AM 20 What about the conspiracy to commit murders? The plan
21 is to kill rivals. The photos, the identifications that are
22 made through Facebook, patrolling, staking out, luring, all
23 those different means that they used to attack them.

24 You heard testimony from Clacker about that, the
25 testimony about how they routinely, how they went searching for

1 people, how they looked for people, and also how they -- part
2 of the whole plan of both membership in the gang and
3 advancement in the gang is to kill people. It's to commit acts
4 of violence. That's part of the fabric of MS-13, until it
5 turned around on Clacker though, right, the conspiracy to kill
6 him.

7 The testimony was the order came from above to kill
8 him. The recording indicates that Violento spoke to Tremendo,
9 you're not going to talk about this like that, which one of you
10:39AM 10 was inside, inside, inside, right, incarcerated. Gave
11 Tremendo -- "It was Tremendo?" "Uh-huh."

12 Tremendo, you heard from the structure, who talked
13 about of the enterprise that the local leader had to get
14 approval to green light one of their members. Do you remember
15 that? The approval comes from El Salvador. This is almost a
16 year after he's incarcerated. His fellow gang members are
17 describing that he pulled the trigger to seek the authorization
18 and receive the authorization to have Clacker killed. With
19 alarming detail, Roca, Chucky and Villano talked about that.

10:40AM 20 Now, I'm not go through and read all these sections of
21 the transcripts again, but you remember that, the technique,
22 the beheading of him so he won't talk, using the wires around
23 his neck, cutting his jugular like a hen so he bleeds out
24 quickly and quietly so he doesn't make any sound, where they
25 would shoot him, but they were afraid they'd be caught on

1 video, the neighbors would call the police and the police would
2 come.

3 Was there a conspiracy to kill Clacker? Absolutely.
4 They hunted him, they circled his house, the GPS map that you
5 have in evidence demonstrates, which is on the bottom of the
6 cooperating witness' car, CW-1's car, shows the car circling
7 its prey, circling its prey, the prey, Christian Henriquez. He
8 wasn't there though. He was upstairs here. He was upstairs
9 here April 28th, testifying in the grand jury. He wasn't
10:41AM 10 around down in Chelsea where his own gang members are circling
11 his house waiting for the opportunity.

12 You remember the video. You remember the video with
13 the machete and the pants. "Be careful, you might get hurt."
14 You remember that. Do you remember their faces on them? Do
15 you believe was that a joke? Was that something they were just
16 joking about? Of course not. They had their gang faces on.
17 They were ready to do what they needed to do to enforce the
18 rules. That's the type of conspiracy that he joined.

19 What about the robberies? Well, word came down from
10:42AM 20 El Salvador, we need more money, got to do more robberies, and
21 robberies, they did. What did Vicky tell you? Because if you
22 think about the robberies when we get to the end here, the
23 robberies will get you a racketeering act just on what Vicky
24 says about one night. Think about that, one night. Three
25 robberies, three different times, one night.

1 One was not a completed robbery. The Judge will
2 instruct you on the sort of lesser charges, assault with intent
3 to rob. That would be like if you stab someone and you don't
4 get your money because they don't have any or they get away
5 during the course of the robbery and assault the person.
6 Again, I, obviously, defer to the Court on the particulars of
7 that, but one night, multiple people involved. How does she
8 know? She's in the car. She's in the car.

9 Is that one of the racketeering acts that he agreed to
10:43AM 10 do himself, although he didn't need to prove it, or that other
11 people that were with him that particular day also agreed to do
12 and did, in fact, do, even though we don't have to prove that.
13 Yes, it is, it's clearly established to the robberies, the
14 evidence of which you have.

15 And also, remember, Roca and Bravo were involved as
16 well, and Clacker indicated to that that other people were
17 involved in robbing both restaurant delivery people and other
18 robberies that he described that were conducted routinely to
19 get money to pay for what? Weapons and to send back to
10:43AM 20 El Salvador.

21 Are those robberies in furtherance of the gang's
22 activities? Of course, they are. That's where they get the
23 money. That's how they funded. Others, we'll talk about in a
24 minute, funded through other means, they funded it primarily,
25 primarily through robberies, and the evidence established that.

1 That evidence established that both he did them and other
2 people did them with him, so clearly they agreed, based upon
3 their conduct, of actually following through.

4 Others funded their activities by means of drug
5 trafficking. You heard that one of the cliques that sold drugs
6 in order to get money to pay for weapons as well as to send
7 back to El Salvador.

8 You also heard that Villano sold marijuana, and he
9 used it according to the statement that he made recorded on
10:44AM 10 April 28th that that's how he supported himself by selling
11 drugs, and also it's very clear from Vicky Martinez that he not
12 only sold drugs, but he provided the money that he made to
13 Tremendo to use in the gang business. Another checking the box
14 of the direct link to drug trafficking to support the direct
15 gang activities of the gang, the words of Villano himself.

16 I want to take a minute here and digress. I need to
17 digress for a minute to this. I need you to watch for
18 something that I expect may occur, what I'm going to call a
19 smoke show, smoke screen. You know, look over here because
10:45AM 20 it's a cloudy issue.

21 What do I mean by that? Self-defense, self-defense.
22 The Judge will instruct on the law again. I keep reminding you
23 of that, but self-defense is a way to mitigate and a way to get
24 a lesser-type charge on the state court offenses of assault
25 with intent to kill or some other charge.

1 Let me give you a big fan for the smoke machine. Do
2 you know the big fan that you're going to plug in and hit on
3 high? It doesn't matter. It doesn't matter. Do you know why
4 it doesn't matter, because we don't need to prove the
5 underlying crime was actually committed, just the agreement, so
6 be thinking when you hear about the smoke, why do I need to be
7 concerned about this if they're not going to have to prove that
8 they committed the crime in the first place?

9 Self-defense, attempted murders. Every reasonable
10:46AM 10 avenue of escape prior to resorting to deadly force. Think
11 about that. In the case before we get to self-defense, two
12 cases that we're going to talk about. I want to talk about
13 Dennis Perdomo Rodriguez. You remember Dennis Perdomo
14 Rodriguez. That was the case where he was graphically cut, I
15 think the words were "eviscerated" and then shot by Roca and
16 Villano. You remember that.

17 Roca says, "I was stabbing him, and the other guy was
18 shooting him in the chest. We killed him. Already dead. We
19 thought he was already dead." What does Villano say? "Bang,
10:47AM 20 bang. The son of a bitch's eyes were open. I was shooting
21 him, and the gun was not firing anymore."

22 Consistent with what the ballisticsian said, perhaps
23 the weapon had a nail in it and wouldn't work very well. He
24 was trying to take the life of Dennis Perdomo Rodriguez, as was
25 Roca, and what occurred?

1 Miraculously, Star Chung told you that she went to the
2 scene, a police officer, and she put his intestines back inside
3 of his person, again, I apologize for the graphicness, but it
4 is what happened, and he was transported to Mass. General.

5 You heard from Dr. Peter Fagenholz, and what did he
6 tell you? He remembered him. Almost three years ago. Why?
7 "People don't usually survive those types of traumas," he said.
8 Cardiac arrest in the operating room, in the emergency
9 department. What was the intention of him being in the
10:48AM 10 emergency department? Cardiac arrest, no blood. He bled out.
11 They brought him back. Intent to kill him? Are you serious?
12 Intent to kill him? Absolutely they intended to kill him, both
13 Roca and Villano.

14 How about the shooting that Tremendo conducted? What
15 do you need to remember about the shooting from Tremendo is
16 some things that are painfully obvious from the video, but some
17 things that I just want to go back and set up before that.

18 What did Vicky Martinez tell you about the shooting
19 that particular day? He was upset over a prior attack, do you
10:49AM 20 remember, he was angry, and maybe it was about her being
21 followed, maybe it was about an incident that occurred the day
22 before, a few days before.

23 In any event, Tremendo's upset, and he was going out
24 to look for 18th Street gang members consistent with this
25 fundamental tenet of being a part of MS-13, and what did he say

1 to her? "Don't worry, we don't have to bother looking, they're
2 here." What does he do? It's all captioned on video. He gets
3 out of the vehicle, and he walks down the street, circles back
4 around, do you remember, and attacks these two individuals,
5 Javier Servellon and Amal Capacillo.

6 Servellon runs initially, and then he tells you in two
7 different exchanges, 1, he was brave to go back to the scene to
8 help his friend, 2, he was stupid to go back to help his
9 friend. In any event, he went back to help his friend, and
10:50AM 10 when he went back to help his friend, he took a chain out, and
11 did he swing it?

12 The video shows him going like this. (Indicating)
13 what happens after that though? He starts running away. Why?
14 He tells you he saw the gun in his hand. The gun was in his
15 hand running away from the scene, and he gets shot at, not once
16 but twice.

17 In fact, he had no more bullets left in his gun when
18 the gun was found in his backpack. He armed himself to go out
19 there and carry out a grudge, an attack on a fellow MS-13
10:50AM 20 member or an affront to his girlfriend. Either way, he arms
21 himself, he loads his gun, he goes to the location, he draws
22 his gun, he aims his gun, he shoots his gun, his gun strikes
23 the target, he shoots his gun again. Self-defense? I don't
24 know. I think it's ridiculous.

25 What did he say though right before he fired the gun?

1 "The beast is going to take you like this." What's the beast?
2 MS-13, the enterprise that he's a part of, that he joined to
3 commit such acts, he's trying to kill people like this. The
4 bullet hit a vital organ, yes, it hit his bowels. He had a
5 peritonitis infection. It is a potential serious infection of
6 the abdominal cavity area, and he had a broken hip, and,
7 obviously, nearby other organs that could have been struck. He
8 intended to kill him, he wanted him dead, and he said something
9 afterwards in the car to Vicky Martinez. What did he say? "I
10:51AM 10 don't know if he died. I shot him. I don't know if he died."

11 Why did he say that? Why did he mention, why didn't
12 he just say I shot him? That's not the goal of MS-13 to shoot
13 him, I'm just going to wound him, I'm going to shoot him in
14 self-defense, no, the goal of MS-13 is to kill him, so he's
15 wondering, I wondered if he died, I finished the job.

16 There's absolutely no evidence of self-defense in a
17 person running away from an incident to get shot between some
18 significant distance away as he ran to get onto the bus to get
19 away from this individual.

10:52AM 20 What did Javier Servellon tell you during the course
21 of the trial at the very conclusion? For the first time, he
22 got to see something. Do you remember? The video. Remember
23 he told you he hadn't seen the video before. You saw the
24 video. What did he say? "See, it shows you I wasn't lying,"
25 his words.

1 The final incident I want to talk to you about is
2 Christian Carillo, the attack on him by the defendant. You
3 have multiple sources of information and evidence that's before
4 you regarding the attack on Christian Carillo by the defendant
5 demonstrating his intent to join the gang. They had the
6 appropriate mindset, the goal of killing people who are
7 perceived and are rival gang members.

8 What happened to Mr. Carillo? He's going to soccer.
9 He meets up with a friend. The friend may or may not be, it's
10:53AM 10 kind of conflicting, an associate of 18th Street. He
11 apparently was wearing some red shoes, possibly a red hat. In
12 any event, they ran into Tremendo, who was with his girlfriend,
13 Vicky. It was in broad daylight. They're coming from lunch.

14 What happens at that point? According to
15 Vicky Martinez, again, your memory of the testimony controls,
16 but she says words to the effect of, "He said I'm Tremendo from
17 Enfermos Criminales." Christian Carillo responded. Tremendo
18 drew up the sword. Do you remember he demonstrated how he did
19 it with the machete and brought it down, and Carillo was able
10:54AM 20 to block it, fractured his arm because he tried to plant it in
21 his face, just like the YouTube videos, tried to plant it in
22 his face.

23 What happened next? He had the small box cart that
24 Christian Carillo had on his belt from working at McDonald's,
25 he used it to opening boxes was taken out. After he was struck

1 once, what's the testimony of the witness? Does that seem like
2 a fair fight? Of course not.

3 No evidence at all of any injuries suffered by the
4 defendant, instead, the second blow, he struck right in the
5 head of Christian Carillo, and he fell to his knees, bled,
6 screaming in pain.

7 The defendant left the area with Vicky, right? What
8 did he say to him right before? "I'm Mara Salvatrucha." Is it
9 in furtherance of the activities of the gang? Of course, it
10 is.

10:55AM

11 That's not the only evidence that you have of that
12 attack though because Vicky Martinez was there as well, and she
13 testified about what happened from her perspective and also
14 described how after the fact back at the house, the apartment,
15 he washed the blood off the machete, a machete just like that
16 one.

17 The final thing I want to remind you, the testimony of
18 Christian Carillo, when he looked around the courtroom, he
19 looked at a person, look at his credibility. Assess how he
20 testified. Assess the fear that was palpable I submit you
21 could see in his face and in his mannerisms when he did that,
22 and he pointed to that man, the defendant.

10:56AM

23 I just have a few more minutes. During your
24 deliberations, you're going to be asked to consider a list of
25 items that are crimes that the Judge will instruct you meet the

1 definition of a racketeering act that someone in the gang had
2 to have committed, MS-13 had to have committed two or more,
3 okay.

4 Do they include murder? Does the evidence support it?
5 Yes, check the box. Do they include robberies? Does the
6 evidence support it? Yes, check the box. Do they include
7 conspiracy to commit murder? Yes, it absolutely does, check
8 the box. Does it include assaults with intent to rob? Yes, it
9 does. Does it include drug trafficking? Yes, it does.

10:57AM 10 Any combination of those count. You have to be
11 unanimous in your decision, but any combination of those count.
12 We provided you numerous opportunities and evidence to go
13 through your deliberations and find that each one of those
14 categories are met by the evidence. Each one of them warrant a
15 finding of guilty collectively. Racketeering conspiracy,
16 again, we need to prove he joined the conspiracy in which an
17 MS-13 member would commit two racketeering acts, qualifying
18 acts described by the Court.

19 When you return from your deliberations, I'm going to
10:58AM 20 ask you to return with a verdict, a verdict that is supported
21 by the evidence, a verdict that is true and just based upon the
22 evidence that you have before you, and I'm going to ask you to
23 find the defendant guilty of the only crime that he's charged
24 with here, racketeering conspiracy.

25 THE COURT: All right. Thank you.

1 Ladies and gentlemen, let me ask you, do you want a
2 break before the next argument? I see some nods. All right.
3 We'll take a short break.

4 THE CLERK: All rise.

5 (JURORS EXITED THE COURTROOM.)

6 THE COURT: One thing I wanted to put on the record, I
7 was not asked, and, therefore, neglected to make my final
8 *Petroziello* ruling, which I don't think makes a substantive
9 difference, but I do find that the statements that the
10:59AM 10 government identified in its supplemental submission on
11 *Petroziello* that were offered, not all of those were offered,
12 but the ones that were offered are admissible as co-conspirator
13 hearsay statements, and they have been tied in and connected as
14 required under the rule. With that, we'll take a short break.

15 THE CLERK: All rise.

16 (A recess was taken.)

17 THE CLERK: All rise for the jury.

18 (JURORS ENTERED THE COURTROOM.)

19 THE CLERK: Thank you. You may be seated. Court is
11:15AM 20 now back in session.

21 THE COURT: Mr. Halpern, whenever you're ready.

22 MR. HALPERN: Thank you.

23 CLOSING ARGUMENT

24 MR. HALPERN: Good morning, ladies and gentlemen. I
25 appreciate your attention through these last couple of weeks.

1 I'm going to start kinds of backwards in terms of the way the
2 jury instructions are laid out. Instead of talking about the
3 issues to agreement to form a RICO pattern, I'm going to talk
4 about the specific crimes first for two reasons.

5 The government, as has been explained to you, they
6 don't have to prove that any specific crime happened in order
7 to establish that there were racketeering acts that were agreed
8 to, but they can use those crimes to establish that
9 racketeering acts actually occurred because if the crime
11:16AM 10 happened and it was a racketeering offense, you know,
11 inherently there was some agreement to do it, so these acts are
12 important, Number 1, because I'm going to show you that
13 although crimes occurred in each case, they were not
14 racketeering offense crimes, so they can't be used as the
15 predicate offenses to justify a RICO count, but there's a
16 second reason that I want to talk about these first is that
17 it's really independent of what type of crime they were, and
18 that really deals with the circumstances under which these
19 crimes occurred because they were random, they were arbitrary,
11:16AM 20 they were not crimes that occurred in a pattern, they weren't
21 crimes that were predictable, they were crimes that happened
22 because something just happened that day that triggered those
23 events, and that's important when you get back to the initial
24 issues, which is what was the agreement? Was there an
25 agreement, and if there was agreement, what exactly was agreed

1 to, and who agreed to it?

2 I want to start with the Katerin Gomez shooting, which
3 is six months after Mr. Aguirre is incarcerated, and there's
4 two issues that are critical that I want to explain.

5 Number 1, it's not murder. It's a crime, it's
6 manslaughter but it's not murder, and I'll explain why, and the
7 second is it's wholly random. It happened because they
8 happened to be followed. It didn't happen because they were
9 out looking for people, it happened because a group of gang
10 kids went after them.

11:18AM

11 Now, whether or not it's murder requires you to look
12 at the elements of Massachusetts law that define murder, and I
13 expect the jury instructions that you're going to get are going
14 to give you a description of what it is that constitutes
15 murder, so for first-degree murder, and you've heard this
16 before, you have to have deliberate premeditation. You have to
17 intend to kill the person, and you have to have time to think
18 about it and make a deliberate decision to do it. That's
19 clearly not what happened here.

11:18AM

20 I think the evidence is -- it's not even an issue
21 where you would make this decision beyond a reasonable doubt.
22 I think if you were to say based on the evidence you heard,
23 what's more likely, that he intended deliberately to shoot
24 Alex Rodriguez or anybody else, or that this was an accident?
25 I think the evidence is overwhelming that it was an accident.

1 It wasn't premeditated. He didn't think about it. He reacted,
2 and I think the evidence strongly suggests he deliberately shot
3 over Rodriguez' head or the head of whoever Rodriguez was with.

4 Second-degree murder is if there's not enough time to
5 deliberately premeditate, the person didn't think about it,
6 they didn't take a moment and reflect, and there are three ways
7 in which the government can prove beyond a reasonable doubt
8 that second-degree murder occurred, and these are called the
9 three prongs of malice, you have to prove malice.

11:20AM 10 So the first prong is that the defendant actually
11 intended, subjectively, he thought about it, he intended to
12 kill the person. He didn't think about it long enough, he
13 didn't deliberate about it long enough to constitute
14 first-degree murder, but he personally subjectively in his head
15 thought I'm going to kill that person.

16 The second way is that they intended to cause grievous
17 bodily harm that a reasonable person would know that could kill
18 him, all right. So he may not have thought he was going to
19 kill him, but he did something to cause enormous bodily injury,
11:20AM 20 and the third, which is kind of the trickiest, is he intended
21 to do something that a reasonable person in his position would
22 have known created a strong and plain likelihood that death
23 would result.

24 So it's complicated for lawyers, let alone people who
25 have never heard of this before. He doesn't have to

1 subjectively intend to kill, he has to subjectively intend to
2 do something that a reasonable person would know, not like
3 might kill somebody, not even likely would kill somebody but
4 that they would know that it was -- I mean, plain and strong
5 likelihood that death would result, so you need that for
6 second-degree murder.

7 And it's true that there is a concept of transferred
8 intent so that if a defendant intended to kill A and shot at A
9 and killed B, the intent can transfer, but that's not what
11:22AM 10 happened here.

11 You know, in every trial I find there are moments that
12 stick out for me. I think a lot of times it's because there
13 are things that I don't anticipate, things that I just didn't
14 see coming, so in this case, one of those moments was the
15 contrast between Trooper Gibbons and Dontae Hart, the guy who
16 followed her.

17 So I hope you remember some of the problems I had
18 trying to cross-examine Trooper Gibbons, who put into her
19 testimony a line or two about -- not responsive to what I had
11:22AM 20 asked that Hector intended to shoot at Rodriguez.

21 The difficulty I had getting her to acknowledge that
22 these group of Eastside kids were following Ramires and his
23 friend rather than just happening to be walking in the same
24 direction. It was difficult cross-examination because she had
25 an agenda.

1 And then you compare that to Mr. Hart, who comes in in
2 a jumpsuit who clearly wanted no part of this, and, I mean, did
3 everything that he said ring true to you? Did he -- and he's
4 not my witness, he's their witness, and not only is he their
5 witness, but they found him, right?

6 She found him from that video, and you know, you know
7 that he had been interviewed and interviewed, he had been asked
8 about everything he saw, had been documented. They knew what
9 he said.

11:23AM 10 Trooper Gibbons knew his story. This wasn't the first
11 time she heard his story, but I didn't know his whole story,
12 and I don't know how many of you were looking at my face, but
13 when I asked him to describe what happened, and this didn't
14 come on direct, he wasn't asked about this on direct, and
15 Trooper Gibbons never mentioned it either, but I asked him, "So
16 when you see these guys for the first time, what do you see?"

17 And he says, "Well, I saw these Eastside kids walking
18 in one direction, and I saw those other two kids, and the one
19 in the light clothes walking in the opposite direction."

11:24AM 20 I'm like, "Huh?" They were following them, and so I
21 asked a follow-up question, "Weren't they walking in the same
22 direction?" He said, "No, they weren't walking in the same
23 direction, they were walking in opposite directions and then
24 the big group turned around and followed."

25 Now, I was surprised but she wasn't. There's no way

1 she was surprised. This was deliberate, all right, it was
2 deliberate that the government didn't present that evidence,
3 and the act of the gang in turning around and following these
4 guys was deliberate. This wasn't an accident, so these guys
5 had ample reason to feel threatened. There were 10 of them
6 that you saw in the video, but there were more that were off
7 the screen, she told you, and so did Mr. Hart that there was
8 another group that you don't see on the video.

9 So this was a good example of something I think you'll
11:25AM 10 see throughout this case, which was the way in which various
11 witnesses, both law enforcement witnesses and cooperating
12 witnesses, attempted to bend the truth to follow a script, to
13 follow the agenda that they got on the stand intending to put
14 in front of you.

15 Could you put up the picture for a minute.

16 Adam Hartley is a master's in forensic science,
17 bachelor's from Rochester Institute of Technology in technical
18 and scientific engineering, a technical engineer for Disney and
19 now working as a ballistic expert, and he told you that the
11:26AM 20 bullet went six to ten feet over the heads of these guys, and
21 if -- you may remember Mr. MacKinlay arguing that there was
22 some evidence that he was really standing closer to the
23 crosswalk, okay, and explained that if that were the case, the
24 bullet would have had to go even higher trajectory. Thank you.

25 So, you saw a parade of witnesses from the government

1 with expertise in ballistics from ATF, from the State Police,
2 from the FBI. If there was a legitimate argument that
3 Mr. Hartley was wrong and that the bullet did not go at least
4 six feet over the heads these guys, how hard do you think it
5 would be for the government to bring somebody in and say that's
6 not what happened here? You know, I'll tell you a different
7 story and I'll explain why.

8 Instead, the only argument you heard suggesting that
9 Mr. Hartley was wrong concerned, you know, why didn't you
11:28AM 10 measure the angle of the bullet in the victim's head, why
11 didn't you take into account statements of witnesses, as though
12 that would have something to do with the science of what he was
13 trying to do.

14 There was one bullet fired, one. If he intended to
15 kill somebody, why did he fire once? Mr. Hart told you that
16 there was a point at which these guys were three feet apart.
17 If he wanted to kill, if Ramires wanted to kill Alex Rodriguez,
18 did he miss him from three feet away and somehow manage to
19 shoot way over his head?

11:28AM 20 I mean, the extent to which the government will go to
21 try to excuse things that don't fit their story, that the gun
22 kicked and he was aiming at Mr. Hart, and, I'm sorry, at
23 Alex Rodriguez and the gun kicked, and that's how the bullet
24 ends up in a second floor window.

25 I mean, guns kick after the bullet is ejected. If you

1 missed by six to ten feet because the gun kicks, I mean, you
2 couldn't shoot anybody, right. I mean, you'd have shooting
3 ranges that were just holes in the ceiling, right. This isn't
4 a result of a gun kicking, this is a result of Hector either
5 wanting to scare these guys off and hoping that if he fires
6 over their heads that they'll leave him alone, or he pulls the
7 gun out, they're already backing off. He doesn't really need
8 to shoot the gun to get them to leave him alone because they
9 have seen the gun, and they're willing to leave him alone, and
11:30AM 10 he shoots a bullet over their heads because he's a hard ass,
11 and he wants to prove a point.

12 It doesn't matter why he did it, as long as he didn't
13 do it because he was intending to kill somebody, and I think
14 the evidence is clear that he wasn't trying to kill somebody,
15 nor was there a strong and plain likelihood that somebody would
16 get killed.

17 I mean, it's a horrible tragedy, but there's no way
18 anybody could have predicted that it was likely that a woman in
19 a second floor window would happen to get shot in the head, so
11:30AM 20 is it possible that that could happen? Obviously, it happened,
21 but nobody could say, well, I mean, a reasonable person would
22 have known that it was very likely that if you shoot a bullet
23 six to ten feet over somebody's head on a street, somebody is
24 going to get killed, so it doesn't fit the definition of
25 malice.

1 What it does fit is the definition of manslaughter,
2 which involves recklessness, and I believe you'll get an
3 instruction on what constitutes manslaughter, and this
4 constituted manslaughter. It wasn't self-defense, it was a
5 crime, it was a serious crime, but it wasn't murder, and it
6 wasn't attempted murder, it was manslaughter. It was an
7 extremely reckless act that accidentally caused somebody's
8 death.

9 And even if you did think, and I don't believe there's
11:31AM 10 evidence to support this, but even if you did think that Hector
11 intended to shoot somebody, you still can get to manslaughter,
12 all right, because there's two types of manslaughter. There's
13 involuntary manslaughter, which is what I'd argue the facts
14 support here, which is an accident, you didn't intend to shoot
15 anybody.

16 Voluntary manslaughter is when you did intend to shoot
17 at someone, but there were mitigating circumstances, and that
18 term will come up again when I talk about some of these other
19 crimes, so it's not pure self-defense, it's called imperfect
11:32AM 20 self-defense, you overreacted, you went further than you needed
21 to, or you reacted out of fear.

22 It could be in sudden combat, something, heat of
23 passion, there's something that provides some excuse for your
24 conduct. It makes it less culpable, it's not murder, but it's
25 still a crime, and so there's two manslaughter options. I

1 think the far more credible one here is that it was just an
2 accident by doing something stupid and risky but not murder,
3 not an intent to kill anybody and not an act that reasonably
4 foreseeably would kill somebody, and it also is incredibly
5 random.

6 I mean, you heard testimony that they were out on the
7 street looking to hurt people. They hadn't hurt anybody in
8 years. I mean, there's no evidence at all that prior to that
9 time those kids had ever shot anybody or attempted to shoot
10 anybody, so the notion that they're out looking to shoot
11 somebody is a little hard to buy given that nobody else had
12 gotten shot ever by these kids.

13 It's an arbitrary event that happens because they're
14 followed, and I think that goes when I come back later to the
15 issue of is there really a pattern of racketeering conduct, or
16 is this a series of just different crimes that becomes
17 important?

18 April 16th, the shooting by Mr. Aguirre. There's no
19 issue of self-defense here. The guy turned and was going away
20 when the gun was pulled. That's not the issue. You need to
21 look at the elements of the crimes, and here you're dealing
22 with what you might think would be called attempted murder, but
23 under Massachusetts law, it's called assault with intent to
24 murder and attempted manslaughter, which is called assault with
25 intent to kill.

1 For assault with intent to murder, the government has
2 to prove beyond a reasonable doubt that the defendant actually
3 subjectively intended to kill the person, right, not that he
4 intended to injure him, not that he intended to seriously
5 injure him, not that a reasonable person would have known that
6 there was a risk that somebody would have gotten killed, none
7 of that, they have to prove that he personally subjectively
8 intended to cause death, and I'd suggest to you there's no
9 evidence of that.

11:35AM 10 If he wanted to kill him, then at the beginning of
11 this fight, he's got a gun, the kid was within three, four,
12 five feet of him, he could have shot him right as he turned
13 around and he was behind him. He didn't. This fight goes on,
14 they run across the street. They keep fighting for a while.

15 There's no gun, right, it's a fist fight, and it
16 remains a fist fight until the point when the victim ultimately
17 pulls out whatever it is, it's not a necklace, whether it's a
18 piece of a bicycle chain, whether it really is the sort of
19 chain that can connect a wallet, it's big enough that he's
11:36AM 20 holding it in his palm, and it's big enough that he's hitting
21 somebody, you know, over the head with it, and there's no gun
22 until that happens, right, and then after the shot, right,
23 Ramires tells you he's in the street, he's helpless.

24 The bus drives away. He's thinking all this kid's got
25 to do is walk like 10 feet towards me, and I'm dead, and

1 Aguirre doesn't do it. If he wanted to kill him, the guy would
2 be dead, so this was not an instance where you can say beyond a
3 reasonable doubt he intended to kill him. I don't even know if
4 you can say it's likely that he intended to kill him because if
5 he had wanted to kill him, he could have killed him twice, once
6 at the beginning of this, and clearly once he shot him.

7 Now, if you don't find deliberate, subjective intent
8 to kill, your inquiry as to whether or not that's a
9 racketeering crime is over because that's what assault with
10 intent to murder requires.

11 Now, you still can, there's another step in which you
12 can find, okay, I do think he intended to kill him, and it's
13 still not a racketeering offense, and that's the difference
14 between assault with intent to murder and assault with intent
15 to kill, and that's where the mitigating factors come in.

16 So the mitigating factors can include and it will be
17 listed in the jury instructions but sort of heat of the moment,
18 sudden combat, overreacting in self-defense, the type of things
19 that are triggered by somebody trying to hit you in the head
20 with a metal chain, right, and so it's a crime, all right.

21 Somebody hits you in the head with a metal chain and
22 you pull out a gun, and he runs away, you don't get to shoot
23 him, all right. He's gone. All right. It's a crime. It's a
24 serious crime, but it's not assault with intent to murder, it's
25 assault with intent to kill if the reason that -- and, by the

1 way, the government's -- this is the government's burden of
2 proof, not mine.

3 They have to prove beyond a reasonable doubt that if
4 Aguirre intended to kill this kid, it had nothing to do with
5 the fact that he got smacked in the head with a chain. It had
6 nothing to do with a fight, that he had an independent motive
7 to kill him. It didn't happen that way.

8 I mean, I'd argue, Number 1, he didn't intend to kill
9 him at all, and, Number 2, if he did intend to kill him, this
11:38AM 10 would have never happened. I mean, do you think this kid would
11 have gotten shot if that chain hadn't been brought out?
12 There's no indication that that would have happened. If he
13 wanted to shoot somebody, he would have pulled out the gun to
14 begin with.

15 I don't have to prove that there was a mitigating
16 factor that caused him to shoot. All right. They have to
17 prove that the intention to kill was not caused by a mitigating
18 factor beyond a reasonable doubt. Henriquez testified based on
19 what he saw that Aguirre pulled out the gun after he got hit
11:39AM 20 with the chain and got mad, and if you look at the video, it's
21 I think clear, and this is another random event, all right.

22 This is an event that's triggered because these two
23 guys are following the girls and the girls reported back and
24 these guys go after them, all right, but not to kill them,
25 which also raises questions about what exactly was this

1 agreement? Because if the agreement, right, of MS-13, if the
2 deal, which you heard again and again and again is we kill the
3 rivals, any excuse we have, we kill the rivals.

4 Well, that doesn't seem to be what these kids agreed
5 to because again and again and again they didn't kill the
6 rivals when they had the opportunity to, and I'm going to argue
7 later it's a different agreement.

8 It wasn't an agreement to do -- whatever those, the
9 videos talk about, whatever the rap songs talk about, that's
11:40AM 10 not what they did. April 6th, you're going to see in evidence
11 Exhibit 117, the medical records of Carillo. He was never
12 admitted to the hospital.

13 He was discharged from the emergency department in
14 about four and a half hours with a scalp wound that was a
15 little over two inches closed with sutures and staples. He was
16 supposed to come back in a couple of weeks to get them removed.
17 He came back in a couple of months.

18 If you look at the records, you'll see that there are
19 inconsistent statements as to how exactly this incident
11:41AM 20 happened. Most of the statements say the opposite of the order
21 that he testified to in terms of now I'm getting confused as to
22 which came first but between whether he got hit in the arm
23 first or whether he got hit in the head first.

24 There's a good deal of inconsistency. What is clear
25 is that he ends up on the ground, and he's helpless, all right,

1 and Aguirre walks away.

2 Now, you're back in some of the same questions that
3 you had to ask regarding April 16th. If Aguirre wanted to kill
4 him, why didn't he because he sure had the opportunity? The
5 injuries themselves don't indicate an intent to kill him. If
6 he wanted to kill him, he could have slashed his neck. The guy
7 was helpless on the ground. He didn't, he walked away.

8 You heard multiple versions of how this fight started.
9 Carillo says that he didn't pull the box cutter first, that
10 Aguirre pulled the machete first. Vicky Martinez says they
11 pulled it at the same time. Clacker said that when he spoke to
12 Aguirre about it, Aguirre told him that the other guy pulled
13 out the box cutter first.

14 You've got good reason I think in this case to
15 question the credibility of Carillo because I kind of suspect
16 that McDonald's gives box cutters to the people who are working
17 there who need to open box cutters so they don't have to walk
18 back and forth to work with their box cutters, and I doubt
19 McDonald's wants their box cutters being taken back and forth
20 from the place of business, so I don't -- you may not find it
21 credible that Carillo has a box cutter solely so he can open
22 boxes at McDonald's.

23 So the first issue is was there an intention to kill?
24 And if you don't think there was beyond a reasonable doubt,
25 your job with respect to April 6th and whether that event

1 counts as a racketeering offense is over, but even if you do
2 think that there was an intent to kill, then you also have to
3 go back to the issue of whether there were mitigating
4 circumstances, and there's certainly testimony in this case
5 that there was, that Carillo pulled the knife first, that there
6 was a fight, that it happened in the context of the fight, but
7 I don't think you get there because I think that initially you
8 really stop at the point where you ask yourself, well, if he
9 wanted to kill him, why didn't he?

11:44AM 10 The plan to kill Clacker, there's no question there
11 was a plan, and the conversations in the car make it clear that
12 there was a plan, but I want you to look at, in particular, a
13 transcript from Exhibit 49, and this is the car conversation on
14 April 21st, and in particular at page 3 of this conversation,
15 so Roca is in the car with CW-1 and Chucky.

16 And all the evidence, the only evidence in this case
17 of Aguirre having anything to do with this plan to kill Clacker
18 is what Roca says in the car that day. That's it, okay, and
19 look at the context in which this happens. Roca has already
11:45AM 20 warned Clacker that there's a plan to kill him, but in the car,
21 moments before he refers to Tremendo, he lies. He makes up a
22 story that the reason that Clacker is afraid and is hiding in
23 his house is because the cops told him that he's a target.
24 That's BS.

25 The reason Clacker is hiding in his house is because

1 Roca told him that there's a plan to kill him, and Roca is
2 keeping that a secret from the guys in the car. Now, he
3 doesn't know that one of the other guys in the car also has a
4 secret, which is CW-1, right, the only guy in this car who
5 isn't playing a charade is Chucky.

6 It makes no sense that Roca would have told Clacker
7 that there was a plan to kill him, to somehow get Clacker to
8 trust him so that, what, so that Clacker would be an easier
9 target? It's just not sensical, but what does make sense is
10 that Clacker has been warned by Roca, Clacker's hiding, and
11 Roca is just spinning out a story in the car, and part of that
12 story is that he had heard that Tremendo had something to do
13 with the plan to kill Clacker.

14 We have no idea how he heard this, whether he heard
15 it, how many different people this information had passed
16 through, and it contradicts other evidence, which is that this
17 plan was created by Big Crazy because Big Crazy thought that
18 Clacker had snitched on his brother, and that's the subject of
19 the stipulation that you have seen today, that's what Clacker
20 told the FBI and the prosecutors, and I read in I think
21 yesterday, that's what CW-1 says in the car that he had heard
22 Big Crazy say that he was going to kill Clacker.

23 There is no way that you can look at the evidence of
24 Roca one day, a few sentences in the context of a complete lie
25 within the car and say, yes, beyond a reasonable doubt

1 Tremendo, who had been in jail at that point for a year, had
2 something to do with killing Clacker.

3 Clacker didn't testify at his trial, right? This is
4 happening at the very moment that Little Crazy has charges
5 against him for a stabbing, so in terms of, you know, some
6 cause-effect relationship, there's a timing connection between
7 what's going on with Little Crazy and the plan to kill Clacker.
8 There's no timing connection between him and the plan.

9 Dennis Perdoma Rodriguez, the stabbing and shooting.
11:48AM 10 There's no dispute over whether that was an assault with intent
11 to murder. I mean, based on the evidence you heard, there's no
12 mitigating circumstances. Even if it did start out as a fight,
13 by the time this kid gets shot, he's on the ground, the issue
14 is what's he have to do with it, and what was th.

15 Perdomo Rodriguez had been a target way before he was
16 even in Chelsea. This is the guy that beat up Clacker a week
17 or two into school. It's the guy who threatened him on the
18 first day of school. It's the guy who tried to stab Clacker in
19 the back, and his buddy ends up stabbing Hector in the hand.

11:49AM 20 There were motives of many, many people, most
21 especially with Clacker to go after this kid that had nothing
22 to do with him. There's no evidence that he knew who this kid
23 was. There's no evidence that he had any conversation or
24 agreement to do anything relating to him, and to the extent
25 there was an agreement to try to retaliate against Perdomo

1 Rodriguez, that agreement existed way before Aguirre entered
2 the picture, right, and it's another random event. They find
3 him on a bus, but did it constitute an attempted murder? Yeah,
4 clearly it did, but not one that's attributable to him.

5 One exhibit I do want you to look at are the financial
6 records from Norfolk MCI that show the money going in and out
7 of his canteen. He came in with about \$300. There are
8 occasional deposits of \$25 to \$40 by somebody named Susan, a
9 few deposits by mail for typically 40 bucks, no deposits from
11:50AM 10 Vicky Martinez.

11 In over two years, the total income is about \$1350,
12 \$58 a month, and much of it comes from the money he earns
13 working at the institution. This is not consistent with the
14 story of MS-13 supports their leaders, they send money to the
15 canteens of the guys who were serving time. He didn't get that
16 money, all right, which raises an issue as to, well, what
17 agreement was he in? Was he in an agreement with MS-13, or was
18 he in an agreement with these six other kids in Chelsea? The
19 robberies.

11:51AM 20 Henriquez testified that he never committed any
21 robbery with Aguirre. He had heard about a robbery that
22 Aguirre did from Roca. Vicky testified that she was in the car
23 when a number of robberies were done, and so you have to ask a
24 couple of questions, how credible is Vicky? How credible was
25 Henriquez? And were these robberies part of a consistent

1 pattern that had to do with MS-13, or was it him? Right.

2 Was it him that had decided independently to go do
3 some robberies, just like Henriquez testified that he had
4 decided that he would freelance and do robberies independent of
5 the gang, and even if there is an agreement on his part to do
6 robberies, who's the agreement with? And the distinction
7 between agreeing with these kids in Chelsea and doing robberies
8 relating to MS-13 because in connecting it back to MS-13, all
9 you've really got to go on are Henriquez and Vicky.

11:52AM 10 Now, the government says, well, you can trust them
11 because they say the same things, their stories are the same,
12 so they must be telling the truth. Well, I kind of see the
13 opposite there. It's exactly right, their stories are the
14 same, amazingly the same, to the word the same about how the
15 plan is always to kill the rivals.

16 I mean, they met with agents, they met with
17 prosecutors, they know what this trial is about from the
18 government's perspective. This has been scripted. They know
19 the script. They know what they're supposed to say, and they
11:53AM 20 have an enormous amount at stake.

21 From Henriquez' perspective, payments have come out of
22 a quarter of million dollars, and, I'm sorry, but saying he
23 didn't get any of it, I don't understand what that means if
24 they're covering all of his living expenses and his rent and
25 his health insurance, but, frankly, more important than the

1 money are the immigration benefits, and it doesn't matter
2 whether Vicky asked for them or whether they said we're going
3 to help you.

4 The reality is these people are under tremendous
5 threat of deportation. That's not like a myth, right, this is
6 real, and so for them to be told we can allow you to spend the
7 rest of your lives in the United States, it's a huge benefit.
8 She sat on top of a train for a month. You don't think that
9 she would manipulate her testimony to help the government so
11:54AM 10 that she can stay in this country with her kids the rest of her
11 life?

12 Henriquez, there are many, many instances of issues
13 with his testimony that raise serious problems with
14 credibility, leaving out an entire year of when he was in
15 Chelsea. I pressed him, and he eventually acknowledged that
16 there might have been upwards of 50 meetings between the clique
17 guys before Tremendo arrived, but I read grand jury testimony
18 in which he said there was one meeting, one in which Roca
19 talked about the clique and talked about Tremendo arriving.

11:55AM 20 The phone calls that he said came before Tremendo
21 arrived, lots of them, in which the group talked on a
22 conference call and in which he had independent calls
23 one-on-one with Aguirre, yet, right, testimony that on the
24 Tango call, they're introducing themselves to one another and
25 going around the room, who am I, what's my name, you know,

1 where am I from?

2 That's when we met him, right, that's what he
3 testified to, that's when we met him, so how did all these
4 other calls happen before he met him? The graffiti store which
5 also was related to this Tango call, which is completely
6 absurd, and the fact that the government would present this as
7 though somehow it makes sense, how did people in gang
8 leadership in El Salvador find out that some kids in Chelsea
9 put up graffiti at the high school?

11:56AM 10 I mean, tell me that, right? Tremendo, he didn't know
11 about it, nobody knew about it, so somebody picked up the phone
12 and called El Salvador, and said, oh, we got a problem in
13 Chelsea, we've got some kids who put up graffiti, and then the
14 El Salvador leaders tell Aguirre that you need to punish these
15 kids.

16 Inconsistent testimony as to whether Aguirre was in
17 the room when he counted this down, which is what he testified
18 to at the grand jury, or whether he did this countdown over
19 Tango. Testimony that they were raising about \$90 a week
11:56AM 20 between themselves so that they could send some money down to
21 El Salvador, and I said, well, it must have been at least a few
22 weeks before you found out that El Salvador was pissed off
23 because you hadn't sent enough money yet, right? Yes, they
24 needed to give us time to get the money.

25 I said, "Did you hear more from Tremendo that

1 El Salvador was not happy about the money and they wanted
2 more?" "Yes."

3 "How many times?" "Five or six."

4 "Two or three weeks apart?" "Yes."

5 "So this went on for months, right?" I asked him,
6 "This went on for months?" "Yes, it did."

7 He was in Chelsea for three weeks, all right, so there
8 is this willingness to say whatever it is he thinks is going to
9 move the story along in a way that helps his patrons, right,
10 11:57AM who's paying for him, who's paying for his family, and who is
11 giving him a ticket to stay in this country.

12 It was more difficult for me to cross-examine
13 Vicky Martinez because I didn't have transcripts. I didn't
14 have grand jury testimony to find inconsistencies, so this was
15 happening on the fly. I think you have to stand back and say
16 how much can we accept here given the benefits that she's
17 receiving, given the immigration benefits?

18 You heard nothing about prior statements that she
19 made. I don't know, despite all the resources the government
20 11:58AM has, no evidence of any prior recorded statements from her, she
21 wasn't put in front of the grand jury. All we know is what she
22 said here, that's it, and she had an enormous incentive to
23 tailor her testimony in a way that would further the
24 government's story.

25 In terms of evidence of corroboration, I'd ask you to

1 look at the efforts the government made to find evidence to
2 link this group in Chelsea to an international conspiracy.
3 Guns and machetes from homes that there's no evidence Aguirre
4 was ever in, that he ever knew about, or that he ever knew
5 anybody with any connection to.

6 The starter pistol and the machete and the knives from
7 the home of a drug dealer, based on a search warrant affidavit,
8 that doesn't even mention MS-13, had no connection at all to
9 anything other than the agent saying he knew, and, by the way,
10 the stuff that the agent said, there was probable cause to look
11 for relating to the shooting wasn't in the house, right, no
12 safe, no gun.

13 There was a day where Mr. Pasricha listed the names of
14 at least half a dozen MS-13 guys who had been arrested. For
15 what? There was no evidence of who they were, no evidence that
16 he knew who they were, no evidence that he had ever talked to
17 them, so, yeah, MS-13, and why not list guys who got arrested
18 in California? Why not list guys who got arrested -- I mean,
19 it doesn't matter. What's it got to do with him and his
20 agreement?

21 Transcript of Virginia, which you heard about again
22 this morning two years after he had been locked up, a
23 membership meeting in Virginia. That's what they're asking you
24 to use to tie him to this international conspiracy.

25 The tragedy of Katerin Gomez, right, what does he have

1 to do with it? Is there really evidence, solid evidence, that
2 this is a murder to begin with rather than some horribly tragic
3 accident that has absolutely nothing to do with him? No phone
4 records of him talking to anybody in MS-13 ever, no jail
5 letters, no correspondence.

6 I want to turn now to the turn now to the RICO
7 conspiracy kind of big issues. Enterprise. What's the
8 enterprise? Suppose there's seven kids in Chelsea and they
9 want to form a gang, okay, but their agreement is they're going
10 to go commit armed robberies, and they use a gun that crossed
11 state lines, okay, and they do the robberies, they do a lot of
12 robberies. There's a pattern, it happens a lot, it's not
13 infrequent, and they use the money for gang purposes.

14 Is it a RICO conspiracy? Probably is, okay, but what
15 is it? It's an agreement between seven kids, all right. Now,
16 suppose they dress up in MS-13 colors and they wear MS-13
17 clothes, and they play MS-13 songs, and they write MS-13 songs.
18 What is it?

19 It's an agreement between seven kids in Chelsea is
20 what it is because the rest of it isn't an agreement, all
21 right. It doesn't matter how many pairs of blue Cortez they
22 have, and it doesn't matter what kind of lyrics they write.
23 The issue is what's the enterprise and what's the agreement?

24 Suppose they even decide to call themselves MS-13,
25 right? Now is there an agreement with MS-13? No. If they had

1 been the Enfermos, they remained the Enfermos. That's the
2 enterprise, right? The ones who participate in the agreement
3 are the enterprise, and calling it something else without
4 evidence that it actually is something else doesn't change the
5 nature of the enterprise. They didn't indict the Enfermos,
6 they didn't indict the clique in Chelsea, they indicted MS-13.

7 It may be a RICO conspiracy, all right, but they
8 indicted the wrong RICO conspiracy because the agreement, the
9 evidence of the agreement is not an MS-13 agreement, the
12:03PM 10 agreement is what these kids agreed to do with one another,
11 right? You don't have evidence of an agreement with anybody
12 else.

13 The criminal group is the group you see in that same
14 picture again and again and again. Those were the kids who
15 entered into this arrangement. What was the pattern? To
16 establish a racketeering crime, there has to be a pattern. The
17 crimes have to be related.

18 I don't think you've heard evidence of a pattern of
19 racketeering crimes. The crimes that they've connected him to
12:04PM 20 weren't racketeering offenses at all, none of them. There's
21 not a single crime, other than the robberies, other than the
22 robberies, that would constitute a racketeering offense, all
23 right.

24 None of the crimes of violence were racketeering
25 offenses. The robberies would be if there were enough of them,

1 Number 1, to create a racketeering pattern, and if the evidence
2 you had concerning them was credible, but there isn't evidence
3 of repetition. You've got Vicky -- the government says, well,
4 there's evidence of a racketeering pattern because he went out
5 in a car with Vicky on one night, she says, and did three
6 robberies. No, that's not a racketeering pattern. That's one
7 night going out in a car and doing three robberies, which is a
8 crime, which can be prosecuted, but not this crime.

9 Lastly, what was the agreement? Writing lyrics isn't
12:05PM 10 an agreement. I asked Henriquez some questions to clarify what
11 exactly the agreement was that he entered into, so by expanding
12 your turf, the main thing you really wanted was to be able to
13 avoid getting beat up, yes. And that's what they wanted.

14 They wanted to be able to walk around Chelsea without
15 getting beat up. They wanted to help each other avoid getting
16 beat up, and they were willing to fight the rivals to do that,
17 and they did fight them. That's not a racketeering offense.
18 Now, they may have talked about killing people, but they didn't
19 kill anybody. They didn't try to kill anybody, and they didn't
12:06PM 20 agree to kill anybody.

21 I asked him, you agreed when you joined up and
22 increased the size of the group from three to four that you
23 were signing up to kill people, right? Right. So did that
24 really mean you were signing up to kill people when your group
25 got big enough to really pose a threat to the 100 or so 18th

1 Street kids? Yes, of course.

2 Agreeing to get into fights and beat the hell out of
3 people is not a racketeering offense. Agreeing to protect your
4 friends and ambushing your enemies is not a racketeering
5 offense unless you agree to kill them. And agreeing to some
6 vague idea of killing your enemies at some unknown time in the
7 future when your gang grows, right, that doesn't pose a threat
8 of criminal activity, right?

9 I mean, it's like my -- if I tell my kid, you know,
12:07PM 10 I'm going to buy you a house when you graduate from medical
11 school, I mean, is it an agreement? Yeah, if he got better
12 than Cs in biology, it mean mean something, but talking about
13 it doesn't make it real.

14 The agreement may have been, well, I hope one day
15 we're big enough and powerful enough and our turf has expanded
16 enough that we're going to be able to kill our rivals. That's
17 a long way, it's a long way from agreeing to kill people.

18 The script here again and again and again repeated by
19 Henriquez and Vicky Martinez is this agreement to kill, but
12:07PM 20 there's no agreement, there's no evidence of an agreement that
21 Aguirre tried to kill anyone ever, right, and aside from the
22 attack on Pardomo Rodriguez, there's no evidence that anyone
23 connected to this group ever tried to kill anyone, and with
24 respect to Pardomo Rodriguez, there were reasons wholly
25 independent of this group and wholly independent of him for

1 what went on.

2 The agreement was not with MS-13, right, despite what
3 it's called, despite the music, despite all of it, the
4 agreement was with them. This isn't about innocence. I mean,
5 I said that in the opening statement, it's not what this is
6 about. It's not about exonerating them, it's not about whether
7 crimes were committed.

8 Crimes were committed, it's about applying the right
9 laws to address the actual crimes that were committed, right.

12:09PM 10 You want to lodge murder charges against Hector Ramires for
11 killing Katerin Gomez, fine, all right, do it, but don't turn
12 it into something it isn't because it's not a RICO offense.
13 That's not how it happened, and that's not why it happened,
14 it's about focusing on what he actually did rather than on a
15 gang that everyone, everyone would like to get rid of.

16 Finding him not guilty is not an excuse, it's not an
17 exoneration at all, it's just an acknowledgement that this was
18 the wrong way to go about it because the crime charged here was
19 not the crime that actually happened. Thank you.

12:10PM 20 THE COURT: All right. Thank you, Mr. Halpern. All
21 right. I think what makes sense, ladies and gentlemen, is for
22 us to take a short break, then to have the government's
23 rebuttal. My instructions, unfortunately, are not short
24 because this is a little bit tangled, and I think what we'll
25 do, we'll have the government's response, we'll have the first

1 part of my instructions, and then we'll break for lunch, and
2 I'll give you the second part after lunch because it's a lot to
3 sit through, and I think you'll be able to absorb it better if
4 I break it into two pieces, but that will be the timetable, and
5 we'll take a break, and we'll come together as soon as we can.

6 THE CLERK: All rise.

7 (JURORS EXITED THE COURTROOM.)

8 THE COURT: I wanted to give the poor woman who was
9 coughing a break, which is why we didn't go straight into the
10 rebuttal.

12:11PM

11 Is there an issue with the jury verdict form which
12 I've gotten circulated?

13 MR. PASCRIHA: The one comment we'd make, your Honor,
14 just change the introductory clause from, "As to Count Two" to
15 maybe, "As to the offense charged." They may be confused by
16 those counts.

17 THE COURT: Yes.

18 MR. PASCRIHA: "As to the offense charged."

19 THE COURT: Because we haven't mentioned Count Two, so
20 "As to the offense charged," we will change that.

12:11PM

21 MR. HALPERN: Judge, have you obviously decided not to
22 list specific racketeering offenses?

23 THE COURT: Correct, correct, simple general verdict,
24 guilty or not guilty.

25 THE CLERK: All rise.

1 (A recess was taken.)

2 THE CLERK: All rise for the jury.

3 (JURORS ENTERED THE COURTROOM.)

4 THE CLERK: You may be seated. Court is now back in
5 session.

6 THE COURT: Okay. Mr. Pasricha.

7 MR. PASCRIHA: Thank you. Good afternoon. The crime
8 charged here is the crime submitted, it's conspiracy, which is
9 why it's entirely unclear to me why you heard 45 minutes about
10 12:26PM murders and assault with intent to murder and mitigation. He's
11 not charged with a murder, he's not charged with the murder of
12 Katerin Gomez, he's not charged with any attempted murder, he's
13 not charged with the attack on Dennis Perdomo Rodriguez,
14 Cristopher Carillo, Javier Servellon, anyone else, he's charged
15 with one thing, conspiracy.

16 The best part about this day for us is going to be not
17 the five minutes I'm going to talk, and I'm going to talk less
18 than five minutes, is that the Judge is going to follow me and
19 instruct you on exactly what the law is, and what you'll hear
20 12:27PM is as long as he joined the conspiracy where people were trying
21 to kill others, it doesn't matter if he actually attempted to
22 do anything.

23 It doesn't matter if any of them actually attempted to
24 kill anyone, it's the agreement that's the crime. I suspect
25 that the Judge is going to instruct you that the crime of

1 conspiracy is complete once the agreement is reached. They
2 reached the agreement, that's it, that's the crime. It doesn't
3 matter if they do anything after that to try to accomplish it.

4 Here, of course, they did, and that's why we showed
5 you some of that. It's not just locker room talk, it's not
6 just bravado, it's not just rap songs, they're out trying to
7 kill people. It goes to intent. That's why we proved that to
8 you, that's why we showed you.

9 A few minor points. The types of crimes. You know,
12:28PM 10 there was this notion in closing, it wasn't premeditated. It
11 wasn't? They were talking for months. They're on recordings.
12 Some of the recordings we showed you. If you want, go back and
13 look at the YouTubes again. One of them is from January, 2014.
14 Before he ever steps foot in here, he's talking about killing
15 people.

16 There was this notion about it wasn't predictable,
17 these were just random attacks. It wasn't predictable? You
18 join a group with the goal to kill people, tell others to go
19 kill people, go out marching in the streets of Chelsea armed
12:28PM 20 with machetes, it's not predictable that some people are going
21 to end up getting murdered, hurt and killed?

22 The number of crimes. The Judge is going to instruct
23 you what pattern means, two or more related crimes. When you
24 consider the evidence, think about what you know about MS-13.
25 Two or more crimes, did you come away thinking, do you know

1 what, MS-13, these calls they are having with El Salvador,
2 these meetings they're having, the instructions they're giving,
3 what they really want to do was commit one crime, after they
4 committed one robbery, that's it, mission accomplished, let's
5 go home, let's disband all the cliques. Of course, there was a
6 pattern.

7 You heard something about we didn't provide this
8 evidence or that evidence. I suspect the Judge will tell you
9 that there's no obligation for law enforcement to follow every
12:29PM 10 conceivable avenue or every technique, and you'll hear about
11 that.

12 There was mention of the enterprise. This was just
13 six kids in Chelsea, had nothing to do with MS-13. The two
14 minutes during the break, I'll just quote from this had nothing
15 to do with MS-13, Tremendo ECS, January, 29th, 2014, before he
16 ever steps foot here to talk with six kids in Chelsea. "You
17 made a mistake, son of a bitch, you made me lose my cool. We
18 are the Salvatruchas that disarm you."

19 The little caption between the video, "The big
12:30PM 20 Mara Salvatrucha rules. We, all, my homies, are flashing
21 MS-13. MS-13 is the one that rules, killing and beating. Your
22 best friend was just cut to pieces, that's what you get for
23 messing with MS-13."

24 It's not six kids in Chelsea. Of course, he's a
25 member of MS-13. He's a leader. He's a palabrero. He's got

1 tattoos, and you're going to hear the Judge instruct you on all
2 of that.

3 And, finally, this notion about, you know, conspiracy
4 to kill Clacker, and I think you heard counsel say there's no
5 question there was a plan to kill Clacker. Great, we agree,
6 there's no question. It doesn't matter who ordered the hit.
7 Was it Tremendo? Yes, he's an MS-13 leader, great. Was it Big
8 Crazy? Great, he's also an MS-13 leader. Was it because he
9 snitched on Little Crazy? Great, a third MS-13 member from
10 another clique.

12:30PM

11 All of that proves the two rules you heard about
12 throughout. They wanted to kill rivals, and they wanted to
13 kill snitches. Little Crazy attacked the rivals trying to kill
14 them, and Big Crazy tried to kill the cooperator for telling
15 police about it or what he thought.

16 So just think about all of that. At the end, he's
17 charged with one crime, conspiracy, and in this case, the
18 evidence leaves no reasonable doubt that MS-13 was a criminal
19 conspiracy. He joined the MS-13 conspiracy. When he joined
20 it, he knew that some member, not even him, some member of
21 MS-13 would commit two or more racketeering acts, and the Judge
22 will tell you when he goes through the instructions what that
23 means.

12:31PM

24 You can go category by category, if it makes it
25 easier. Start with murder. Does he have a plan to commit two

1 or more murders? Yes. Okay, great, your work is done. You
2 all agree, there's unanimity, perfect, go to the next category.
3 Two or more attempted murders, yes, great, that's enough. Drug
4 trafficking, okay, you all agree, that's enough. Robbery,
5 okay, you agree, that's enough.

6 The Judge is going to instruct you that it can even be
7 some combination of those as long as you all agree. Here,
8 there's no doubt. Consider the evidence, as you must, follow
9 the law, as you must, find him guilty, as you must. Thank you.

12:32PM 10 THE COURT: Thank you, Mr. Pasricha.

11 JURY INSTRUCTIONS

12 THE COURT: All right. Ladies and gentlemen, it's now
13 time for me to give you your instructions on the law that you
14 are to follow. Ms. Pezzarossi is going to hand out to you a
15 copy of the instructions. What I'm going to do is I'm going to
16 read partway through these, and then we're going to break for
17 lunch. I'm going to split it into two pieces because they are
18 quite long, and I don't want you to start to fade as I get to
19 the instructions toward the end, which are important.

12:32PM 20 You'll recall I gave you some preliminary instructions
21 at the beginning of the case. If there's anything inconsistent
22 between those instructions and these, these are the ones that
23 control. I don't think there's anything inconsistent, but just
24 to be sure, these are the ones that control your deliberations,
25 and I permitted the lawyers to talk somewhat about the

1 applicable law in their arguments.

2 Again, if they said anything that's inconsistent,
3 these are the instructions that you are to follow in deciding
4 the case. Each of you should have your own copy to read along
5 with me as I read them aloud to you. You can take notes on
6 them. I'll let you take them with you into the jury room when
7 the time comes to deliberate. I'm not going to let you take
8 them at lunch because I won't have read them all, you'll have
9 to leave them on your chair when we break, but once you go to
12:33PM 10 deliberate, you can take them with you and read them and refer
11 to them.

12 So if you would turn with me, the first couple pages
13 are the caption and the title and the table of contents, and
14 then if you'll start following along with me at page 4.

15 It is your duty to find the facts from the evidence
16 admitted in this case. To those facts, you must apply the law
17 as I give it to you. The determination of the law is my duty
18 as the Judge. It is your duty to apply the law exactly as I
19 give it to you, whether you agree with it or not.

12:34PM 20 In following my instructions, you must follow all of
21 them and not single out some and ignore others. They are all
22 important.

23 You must not interpret these instructions, or anything
24 I may have said or done, as a suggestion by me as to what
25 verdict you should return. That is a matter entirely for to

1 you decide.

2 Every person accused of a crime is presumed to be
3 innocent unless and until his guilt is proved beyond a
4 reasonable doubt. The presumption is not a mere formality, it
5 is a fundamental principle of our system of justice.

6 The presumption of innocence means that the burden of
7 proof is always on the government to prove that the defendant
8 is guilty of the crimes with which he is charged beyond a
9 reasonable doubt.

12:34PM 10 This burden never shifts to the defendant. It is
11 always the government's burden to prove each of the elements of
12 the crime charged beyond a reasonable doubt. The defendant
13 does not have to prove that he is innocent, or present any
14 evidence, or call any witnesses.

15 The presumption of innocence alone may be sufficient
16 to raise a reasonable doubt and to require the acquittal of the
17 defendant. You may not convict the defendant of any crime
18 charged against him if the government fails, or is unable, to
19 prove every element of that crime beyond a reasonable doubt.

12:35PM 20 You may not convict the defendant based on speculation
21 or conjecture.

22 You may not convict the defendant if you decide that
23 it is equally likely that he is guilty or not guilty. If you
24 decide that the evidence would reasonably permit either of two
25 conclusions -- either that he is guilty as charged, or that he

1 is not guilty -- you must find the defendant not guilty.

2 You may not convict the defendant if you decide that
3 it is only probable or even strongly probable that he is
4 guilty. A mere probability of guilt is not guilt beyond a
5 reasonable doubt.

6 The law does not require that the government prove
7 guilt beyond all possible doubt; proof beyond a reasonable
8 doubt is sufficient to convict. There are very few things in
9 this world that we know with absolute certainty, and in
10 criminal cases, the law does not require proof that overcomes
11 every possible doubt.

12 Again, the defendant is presumed to be innocent, and
13 the government bears the burden of proving him guilty beyond a
14 reasonable doubt. If, after fair and impartial consideration
15 of all the evidence, you have a reasonable doubt as to the
16 defendant's guilt, it is your duty to acquit him. On the other
17 hand, if after fair and impartial consideration of all the
18 evidence, you are satisfied beyond a reasonable doubt as to his
19 guilt, you should vote to convict him.

12:36PM 20 Like all defendants, the defendant in this case has a
21 constitutional right not to testify. No inference of guilt, or
22 of anything else, may be drawn from the fact that the defendant
23 did not testify. That fact should not enter in any way in your
24 deliberations or your vote. For any of you to do so would be
25 wrong; indeed, it would be a violation of your oath as a juror.

1 Your verdict must be based solely upon the evidence.
2 It would be improper for you to base your verdict on anything
3 that is not evidence.

4 Let me go off script here and again remind you I did
5 strike that evidence concerning the robbery of Mr. Martinez and
6 remind you that you may not consider that as part of your
7 deliberations.

8 Returning to the script, you may not base your verdict
9 on any personal feelings, prejudices, or sympathies you may
12:37PM 10 have about the defendant or about the nature of the crimes with
11 which he is charged.

12 You may not consider or be influenced by any possible
13 punishment that may be imposed on the defendant.

14 Again, your verdict must be based solely on the
15 evidence and according to the law.

16 The evidence in this case consists of the sworn
17 testimony of witnesses, both on direct and cross-examination;
18 the exhibits that have been received into evidence; and any
19 facts to which the parties have agreed or stipulated. You
12:37PM 20 should consider all of the evidence, no matter what form it
21 takes, and no matter which party introduced it.

22 Whether the government has sustained its burden of
23 proof does not depend upon the number of witnesses it has
24 called, or upon the number of exhibits it has offered, but
25 instead upon the nature and quality of the evidence presented.

1 Certain things are not evidence.

2 Arguments and statements by lawyers are not evidence.

3 The lawyers are not witnesses. What they say in their opening
4 statements, closing arguments, and at other times is intended
5 to help you interpret the evidence, but it is not evidence. If
6 the facts, as you remember them from the evidence, differ from
7 the way the lawyers have stated them, your memory of the facts
8 should control.

9 Questions by lawyers standing alone are not evidence.

12:38PM 10 Again, the lawyers are not witnesses. The question and the
11 answer taken together are the evidence.

12 Objections by lawyers are not evidence. Lawyers have
13 a duty to their clients to object when they believe a question
14 or an exhibit is improper under the rules of evidence. You
15 should not be influenced by any objection, or by my ruling on
16 it, and you should not speculate or guess about what the answer
17 might have been or what an exhibit might have said.

18 Anything that I have struck or instructed you to
19 disregard is not evidence.

12:38PM 20 The indictment is not evidence.

21 Anything you may have seen or heard when the Court was
22 not in session is not evidence. You must decide the case sole
23 lit on the evidence received at trial.

24 Evidence may take the form of either "direct evidence"
25 or "circumstantial evidence." "Direct evidence" is direct

1 proof of a fact, such as testimony from an eyewitness that the
2 witness saw something. "Circumstantial evidence" is indirect
3 evidence; that is, proof of a fact (or facts) from which you
4 could draw a reasonable inference that another fact exists,
5 even though it has not been proved directly.

6 You are entitled to consider both direct and
7 circumstantial evidence. The law permits you to give equal
8 weight to both. It is for you to decide how much weight to
9 give to any particular piece of evidence, whether direct or
10 circumstantial.

11 Although you may consider only the evidence presented
12 in the case, you are not limited to the plain statements made
13 by witnesses or contained in the documents. In other words,
14 you are not limited solely to what you saw and heard as the
15 witnesses testified.

16 You are also permitted to draw reasonable inferences
17 from the facts if you believe those inferences are justified in
18 light of common sense and personal experience. An inference is
19 simply a deduction or a conclusion that may be drawn from the
20 facts that have been established. Any inferences you draw must
21 be reasonable and based on the facts as you find them.

22 Inferences may not be based on speculation or conjecture.

23 A particular item of evidence is sometimes received
24 for a limited purpose only. That is, it can be used by you
25 only for one particular purpose and not for any other purpose.

1 I have told you when that occurred and instructed you on the
2 purposes for which the item can and cannot be used.

3 Some of the evidence has been received in the form of
4 a stipulation. A stipulation simply means that the government
5 and the defendant accept the truth of a particular proposition
6 or fact.

7 Because there is no disagreement, there is no need for
8 evidence as to that issue apart from the stipulation. You may
9 accept the stipulation as a fact to be given whatever weight
10 you choose.

12:40PM

11 You do not have to accept the testimony of any witness
12 if you find that the witness is not credible. You must decide
13 which witnesses to believe, considering all of the evidence and
14 drawing upon your common sense and personal experience. You
15 may believe all of the testimony of a witness, or some of it,
16 or none of it. You alone are the judges of the witnesses'
17 credibility.

18 In deciding whether to believe testimony of the
19 witnesses, you may want to take into consideration such factors
20 as their conduct and demeanor while testifying; any apparent
21 fairness or unfairness they may have displayed; any interest
22 they may have in the outcome of the case; any prejudice or bias
23 they may have shown; their opportunities for seeing and knowing
24 the things about which they have testified; the reasonableness
25 or unreasonableness of the events that they have related to you

12:41PM

1 in their testimony; and any other evidence that tends to
2 support or contradict their versions of the events.

3 If a witness testified falsely about any significant
4 matter, you may choose to distrust the testimony of that
5 witness in other respects. You may reject all of the testimony
6 of that witness or give it such credibility as you may think it
7 deserves.

8 The testimony of a witness may be discredited or
9 impeached by showing that he or she previously made statements
10 that are inconsistent with his or her present testimony. If a
11 witness made inconsistent statements about any significant
12 matter, you may choose to distrust the testimony of that
13 witness in other respects. You may reject all of the testimony
14 of that witness or give it such credibility as you may think it
15 deserves.

16 Sometimes, of course, people make innocent mistakes,
17 particularly as to unimportant details. Not every
18 contradiction or inconsistency is necessarily important.
19 Again, you alone are the judges of the witnesses' credibility.

12:42PM 20 You have heard the testimony of law enforcement
21 officers and other witnesses employed by the government. You
22 may accept or reject that testimony. The fact that a witness
23 may be employed as a law enforcement officer or by the
24 government does not mean that his or her testimony is
25 necessarily deserving of more or less consideration or greater

1 or less weight than that of any other witness.

2 Again, it is for you to decide whether to accept the
3 testimony of any witness and what weight, if any, to give to
4 that testimony.

5 You've heard the testimony of witnesses who have
6 entered into cooperation agreements with the government.

7 The law allows the government to enter into such
8 agreements, to make promises or potential rewards for
9 cooperation, and to call as witnesses people to whom such
10 promises have been given. The government may give or promise
11 different types of benefits to such persons, including such
12 things as assistance with immigration matters.

13 However, a witness who participated in criminal
14 activity and who has entered into a cooperation agreement with
15 the government has an interest in the outcome of the case that
16 is different from that of an ordinary witness. A cooperating
17 witness may, of course, testify truthfully in all respects.
18 But such a witness may also have a motive to tailor his or her
19 testimony to please the government. You should, therefore,
20 examine the testimony of a cooperating witness with caution and
21 weigh it with greater care.

22 Again, it is for you to decide whether to accept the
23 testimony of any witness and what weight, if any, to give to
24 that testimony.

25 You've heard the testimony of witnesses who testified

1 under a promise of immunity.

2 "Immunity" means that a witness' testimony may not be
3 used against him or her in any later criminal proceeding.

4 However, if the witness testifies untruthfully, he or she could
5 be prosecuted for perjury or making a false statement, even
6 though he or she was testifying under a promise of immunity.

7 Some people in this position are entirely truthful
8 when testifying. Still, you should consider the testimony of
9 an immunized witness with particular care and caution. The
10 witness may have had reason to make up stories or exaggerate
11 what others did for his or her own purposes. You must
12 determine whether the testimony of such a witness has been
13 affected by any interest in the outcome of case, any prejudice
14 for or against the defendant, or by any other benefits he or
15 she may have received from the government.

16 Again, it is for you to decide whether to accept the
17 testimony of any witness and what weight, if any, to give to
18 that testimony.

19 You have heard testimony that law enforcement
20 conducted certain testing procedures and followed certain
21 investigative techniques. You may consider that testimony as
22 you would any other evidence and give it such weight as you
23 believe it may deserve under the circumstances.

24 You may make reasonable inferences from the fact that
25 certain tests were not conducted or that certain investigative

1 techniques were not used. Any such inferences, however, should
2 not be based on speculation or conjecture about what the
3 results of such tests or techniques might have been. There is
4 no legal requirement that the government use any specific tests
5 or techniques or all possible tests or techniques to prove its
6 case.

7 Certain charts have been shown to you in order to help
8 explain the facts disclosed by the books, records and other
9 documents that are in evidence in the case. They are not
10 themselves evidence. If they do not correctly reflect the
11 facts or figures shown by the evidence in the case, you should
12 not accept them.

13 You may, however, consider any summary that has been
14 received into evidence as you would any other piece of evidence
15 and give it the weight or importance, if any, that you feel it
16 deserves.

17 As I indicated at the beginning of the trial, you've
18 been permitted to take notes, but some cautions apply. You
19 should bear in mind that not everything that is written down is
20 necessarily what was said. When you return to the jury room to
21 discuss the case, do not assume simply because something
22 appears in somebody's notes that it necessarily took place in
23 court. Notes are an aid to recollection, nothing more. The
24 fact that something is written down does not mean that it is
25 necessarily accurate.

1 The numbers assigned to the exhibits are for
2 convenience and in order to ensure an orderly procedure. You
3 should draw no inference from the fact that a particular
4 exhibit was assigned a particular number or that there may be
5 gaps in the number sequence.

6 All right. That's where I'm going to pause. From
7 this point forward, I'm going to talk about what the actual
8 crime that he's charged with is and what the government has to
9 prove, so let us break then for lunch.

12:47PM 10 Again, please leave your instructions on your chair,
11 if you would, and we'll pick up again when we return. I'd like
12 to have this lunch be as close to 45 minutes as we can make it.
13 Sometimes it's hard to get all the moving pieces in order, but
14 in order to keep the case moving, your lunch should be up there
15 if you haven't nibbled on it already.

16 And I ask you one more time, you're all going to be
17 together, you are almost ready to deliberate, but please don't
18 talk about the case during lunch. You can talk about the great
19 Patriots victory this weekend or anything else that comes to
12:47PM 20 mind, upcoming plans for Thanksgiving, just not about this
21 case, and then when we return at 1:30 or as close to 1:30 as we
22 can make it, I'll give you the remainder of the instructions.
23 Thank you.

24 THE CLERK: All rise.

25 (JURORS EXITED THE COURTROOM.)

1 (A recess was taken.)

2 THE CLERK: All rise for the jury.

3 (JURORS ENTERED THE COURTROOM.)

4 THE CLERK: Thank you. You may be seated. Court is
5 now back in session.

6 THE COURT: Ladies and gentlemen, welcome back. If
7 you would turn with me to page 24, please, and I'll continue
8 with my instructions.

9 All right. I'm now going to give you some
01:35PM 10 instructions on the nature of the crime charged in the
11 indictment and the elements that the government must prove
12 beyond a reasonable doubt.

13 The indictment contains one count against the
14 defendant. He is charged with conspiracy to commit
15 racketeering. Racketeering is a crime under federal law --
16 conspiracy to commit racketeering is also a crime under federal
17 law. It is a separate crime from racketeering.

18 "Racketeering" means conducting the affairs of an
19 "enterprise" that affects "interstate commerce" through a
01:36PM 20 "pattern" of "racketeering activity." Each of those terms has
21 a particular meaning, which I will explain to you.

22 Again, the defendant is charged with conspiracy to
23 commit racketeering. I will begin by explaining the meaning of
24 a "conspiracy."

25 A "conspiracy" is an agreement to commit a crime.

1 Again, it's a separate crime from the crime that is the object
2 of the conspiracy -- what we sometimes called the "substantive"
3 crime.

4 I will give you a simple example to help illustrate
5 the difference between a crime and a conspiracy to commit that
6 crime. It is a federal crime to commit bank robbery. (This
7 case, of course, does not involve an alleged bank robbery. I'm
8 using this only as an illustration.) If a person robs a bank,
9 he has committed a bank robbery. If three people agree to rob
01:37PM 10 a bank -- one thinks up the plan, one agrees to rob the bank,
11 and one agrees to drive the getaway car -- all three have
12 conspired to rob the bank.

13 Again, a "conspiracy" is an agreement to commit a
14 crime. The agreement may be spoken or unspoken. It does not
15 have to be a formal agreement or a plan in which everyone
16 involved sat down together and worked out all the details. The
17 government, however, must prove beyond a reasonable doubt that
18 those who were involved shared a general understanding about
19 the crime.

01:37PM 20 Mere similarity of conduct among various people or the
21 fact that they may have associated with each other does not
22 necessarily establish the existence of a conspiracy, although
23 you may consider such factors in deciding whether a conspiracy
24 existed. Mere association with other persons, even persons
25 involved in criminal activity, does not by itself establish the

1 existence of a conspiracy.

2 The object of a conspiracy must be one or more crimes.
3 To go back to my bank robbery example, the object of the
4 conspiracy among the three persons was to rob a bank, which is
5 itself a crime.

6 A conspiracy is complete, and the crime has occurred,
7 once the agreement has occurred. The government does not have
8 to prove that the conspiracy succeeded or that its objects were
9 achieved.

01:38PM 10 In my bank robbery example, the three conspirators
11 committed the crime of conspiracy as soon as they agreed to rob
12 the bank. Even if they had been arrested before the robbery
13 occurred, or if the robbery had been attempted but failed, they
14 would have nonetheless committed the crime of conspiracy to
15 commit bank robbery. Even if one of the conspirators later
16 changed his mind and decided to break into a house that day
17 rather than rob a bank, they would have nonetheless committed
18 the crime of conspiracy to commit a bank robbery. But if all
19 three people thought that the object was to commit a crime but
01:38PM 20 one of them thought it was a different type of crime -- for
21 example, if he thought it was an agreement to break into a
22 house -- that person would not have conspired with the others
23 to commit bank robbery.

24 I will now turn to the elements of the crime that the
25 government must prove in this case. Again, the defendant is

1 charged with the crime of conspiracy to commit racketeering.

2 For you to find the defendant guilty of that crime,
3 you must be convinced that the government has proved each of
4 the following things beyond a reasonable doubt:

5 First, that there was a conspiracy to commit the crime
6 of racketeering -- that is, an agreement among two or more
7 persons to conduct the affairs of an enterprise affecting
8 interstate commerce through a pattern of racketeering activity.

9 Second, that the defendant knowingly and willfully
01:39PM 10 joined in that conspiracy;

11 And, third, that the defendant or another member of
12 the conspiracy agreed to commit at least two racketeering acts.

13 I will now explain the elements in detail.

14 The first element that the government must prove
15 beyond a reasonable doubt is that there was a conspiracy to
16 commit the crime of racketeering -- that is, that there was an
17 agreement among two or more persons to conduct the affairs of
18 an "enterprise" affecting "interstate commerce" through a
19 pattern of "racketeering activity."

01:40PM 20 I have already explained to you what a conspiracy is.

21 In a moment, I will explain the terms "enterprise,"
22 "interstate commerce," "pattern" and "racketeering activity."

23 Again, the government must prove the existence of an
24 agreement among two or more persons to commit the crime of
25 racketeering.

1 The government must prove the existence of the
2 agreement charged in the indictment and not some other
3 agreement. The conspiracy charged in the indictment is a
4 conspiracy to conduct or participate in, directly or
5 indirectly, the affairs of the MS-13 enterprise through a
6 pattern of racketeering activity.

7 If you find beyond a reasonable doubt that a
8 conspiracy of some kind existed between the defendant and some
9 other person, that in and of itself is not sufficient to find
01:40PM 10 the defendant guilty. The government is required to prove
11 beyond a reasonable doubt the existence of the conspiracy
12 specified in the indictment.

13 Again, the object of the conspiracy must be a crime.
14 Here, the indictment alleges that the object of the conspiracy
15 was the crime of racketeering -- specifically to conduct the
16 affairs of MS-13 through a pattern of racketeering activity.

17 An "enterprise" is a group of people who have
18 associated together for a common purpose of engaging in a
19 course of conduct over a period of time. It may be a group of
01:41PM 20 individuals associated, in fact, although not a formal or a
21 legal entity.

22 The "enterprise," in addition to having a common
23 purpose, must have an ongoing organization, either formal or
24 informal, and it must have personnel who function as a
25 continuing unit. The membership of the association may change

1 over time by adding or losing individuals during the course of
2 its existence.

3 Here, the indictment alleges that the enterprise was a
4 criminal organization known as La Mara Salvatrucha, or MS-13.

5 The "enterprise" must be one affecting "interstate
6 commerce." Interstate commerce means the movement of goods,
7 services, money, and individuals between states. It also
8 includes foreign commerce. (That is, commerce between the
9 United States and a foreign nation.) It includes, among other
01:42PM 10 things, the use of interstate or international mail, wire,
11 telephone or banking facilities to conduct the affairs of the
12 enterprise; the movement of persons across state or
13 international borders to conduct the affairs of the enterprise;
14 and the possession of firearms on behalf of the enterprise that
15 had been previously transported across state or international
16 borders.

17 The government must prove that the enterprise was
18 intended to engage in interstate commerce or affect interstate
19 commerce; however, the effect need not be substantial or
01:42PM 20 significant. A minimal effect is sufficient. The government
21 does not have to prove that the enterprise actually affected
22 interstate commerce, or that the defendant knew he was
23 affecting interstate commerce.

24 The "enterprise" must be one "affecting interstate
25 commerce" through a "pattern" of "racketeering activity." I

1 will first define "racketeering activity," and then define
2 "pattern."

3 "Racketeering activity" consists of "racketeering
4 acts." "Racketeering acts" are certain specific crimes defined
5 by federal law. The racketeering acts alleged in the
6 indictment in this case are the following crimes:

7 murder,
8 assault with intent to commit murder,
9 armed assault with intent to murder;
01:43PM 10 conspiracy to commit murder,
11 armed robbery,
12 armed assault with intent to rob,
13 and criminal offenses involving trafficking in
14 narcotics.

15 In a moment, I will explain the elements of some of
16 these offenses in more detail.

17 A "pattern" of racketeering activity consists of two
18 or more racketeering acts that are related and pose a threat of
19 continued criminal activity.

01:43PM 20 To prove that the acts of racketeering are related,
21 the government must prove that the acts had a meaningful
22 connection to the enterprise, and that they had the same or
23 similar purposes, results, participants, victims, or methods of
24 commission, or that they are otherwise inter-related by
25 distinguishing characteristics and not merely isolated events.

1 The acts may be dissimilar or not related to each other as long
2 as they are related to the enterprise. A series of
3 disconnected crimes does not constitute a pattern of
4 racketeering activity.

5 Examples of "related" racketeering acts are acts that
6 benefit the enterprise, that are authorized by the enterprise,
7 or that further or promote the purposes of the enterprise.

8 To prove that racketeering acts pose a threat of
9 "continued racketeering activity," the government must prove
01:44PM 10 that the acts are not a series of discontinued crimes but part
11 of a long-term association that exists for criminal purposes.

12 The second element that the government must prove
13 beyond a reasonable doubt is that the defendant knowingly and
14 willfully joined the conspiracy charged in the indictment.

15 The defendant acted "knowingly" if he acted with
16 knowledge and awareness of his actions and did not act out of
17 ignorance, mistake, neglect, or accident.

18 The defendant acted "willfully" if he acted
19 voluntarily and intentionally, and with the specific intent to
01:44PM 20 do something the law forbids -- that is, with a bad purpose
21 either to disobey or to disregard the law.

22 The government must prove that the defendant joined
23 the conspiracy with knowledge of its basic aims, an unlawful
24 purpose, and with the specific intention of furthering its
25 objectives.

1 The government does not have to prove that the
2 defendant knew the identities of each and every other member of
3 the conspiracy. It does not have prove that the defendant was
4 aware or informed of all of the activities of the other
5 members, all of the details of the conspiracy, or its complete
6 scope. However, it must prove that the defendant knew at least
7 some of the essential purposes or objectives of the conspiracy
8 and intended to aid in the accomplishment of its objects.

9 It is not enough for the government to prove, without
01:45PM 10 more, that the defendant simply knew of, or acquiesced in, the
11 conspiracy. The fact that the defendant merely happened to
12 further the purposes or objectives of the conspiracy, without
13 more, is not sufficient.

14 Ordinarily, knowledge or intent may not be proved
15 directly because there is no way of directly scrutinizing the
16 workings of the human mind. Knowledge and intent must be
17 proved indirectly.

18 In determining what the defendant knew or intended at
19 a particular time, you may consider any statements he may have
01:46PM 20 made; anything that he did, or failed to do, and any other fact
21 received in evidence that may reflect his knowledge or intent.

22 You may infer -- although you are not required to --
23 that a person intends the natural and probable consequences of
24 his acts and omissions when those acts are done knowingly.

25 The third element that the government must prove

1 beyond a reasonable doubt is that the defendant or another
2 member of the conspiracy agreed to commit at least two
3 racketeering acts.

4 The government must prove that the defendant agreed
5 that the objective of the enterprise would be to engage in a
6 pattern of racketeering activity. In other words, the
7 government must prove that the defendant agreed to join the
8 conspiracy, and that the conspiracy involved or would have
9 involved the commission of two racketeering acts. The
01:46PM 10 government is not required to prove either that the defendant
11 personally agreed to commit two racketeering acts or that he
12 actually committed two such acts. However, the government must
13 prove that the defendant intended to further an endeavor that
14 would have satisfied, or actually did satisfy, the requirement
15 of a pattern of racketeering activity.

16 Again, the definition of "racketeering acts" is
17 limited to a specific list of crimes set by statute.
18 Furthermore, the indictment charges that the pattern of
19 racketeering activity engaged in by the enterprise, (that is,
01:47PM 20 by MS-13) consisted of certain specific types of crimes,
21 generally involving murder, armed robbery, and drug
22 trafficking.

23 There are many other crimes that do not qualify as
24 "racketeering acts." In order to be convicted of conspiracy to
25 commit racketeering, the government must prove that the

1 defendant agreed that one or more members of the enterprise
2 would commit crimes that qualify as racketeering acts by law,
3 and that are specified in the indictment.

4 In order to decide that, you need to know the
5 definitions of those crimes. Therefore, I will instruct you on
6 the elements of those crimes.

7 Again, the defendant is not charged with having
8 committed any of these crimes. He is charged with conspiracy
9 to commit racketeering. I am providing you with these
01:48PM 10 definitions so that you can determine whether the object of the
11 conspiracy was to conduct the affairs of an enterprise --
12 there's an extra word affairs in there, you can strike that
13 out -- whether the object of the conspiracy was to conduct the
14 affairs of an enterprise through a pattern of racketeering
15 activity. I will also instruct you on the definitions of
16 certain related crimes that are not racketeering acts to try to
17 give you a reasonably clear picture of what the law requires.

18 Because the defendant is charged with conspiracy, it
19 is not necessary for the government to prove that anyone
01:48PM 20 actually committed two or more racketeering acts. Indeed, the
21 government does not have to prove that any racketeering act
22 occurred at all. Thus, for example, as long as the defendant
23 agreed to join in an enterprise in which some members would
24 engage in murders, the government need not prove that the
25 murders ever happened, or that the defendant specifically

1 agreed that the enterprise would murder any specific person on
2 any specific day.

3 Again, the government is not required to prove that
4 any specific acts are racketeering acts, or that any such acts
5 occurred at all, however, the government must prove that the
6 defendant agreed to join in the enterprise engaged in
7 particular types of racketeering acts. You must unanimously
8 agree on which type or types of racketeering activity that the
9 defendant agreed the enterprise would conduct -- for example,
01:49PM 10 at least two acts of murder, at least two acts of robbery, or
11 at least two acts of narcotics trafficking, or all of them, or
12 any combination of them.

13 All right. The following crimes under Massachusetts
14 law constitute "racketeering acts" under federal law and as
15 charged in the indictment:

16 Murder. Murder is the unlawful killing of a human
17 being. Murder may be committed in the first degree or the
18 second degree. Murder in the first degree can be with either
19 deliberate premeditation or with extreme atrocity or cruelty.
01:50PM 20 Murder in the first degree requires that a perpetrator caused
21 the victim's death, consciously or purposely intended to kill,
22 and committed the killing with deliberate premeditation, that
23 is, killed after a period of reflection.

24 Deliberate premeditation does not require any
25 particular length of time of reflection. A decision to kill

1 may be formed over a period of days, hours, or even a few
2 seconds.

3 The question of whether a perpetrator intended to kill
4 refers to that perpetrator's objectives or purposes. A
5 perpetrator must have had it in his or her mind to kill the
6 victim. It involves concentrating or focusing the mind for
7 some perceptible period. It is a conscious act, with the
8 determination of the mind to do the act. It is contemplation
9 rather than reflection, and it must precede the act. A
01:50PM 10 perpetrator must have possessed an actual, subjective intent to
11 kill.

12 If a perpetrator intends to kill a person and in
13 attempting to do so mistakenly kills another person, such as a
14 bystander, the perpetrator is treated under the law as if he or
15 she intended to kill the actual victim. This is referred to as
16 transferred intent under the law. For example, if I aim and
17 fire a gun at one person intending to kill him but instead
18 mistakenly kill another person, the law treats me as if I
19 intended to kill the actual victim. My intent to kill is
01:51PM 20 transferred to the actual victim.

21 Murder in the first degree by extreme atrocity or
22 cruelty requires that a person caused the person's death, acted
23 with malice, and committed the killing with extreme atrocity or
24 cruelty.

25 A perpetrator acted with malice if he or she either

1 (a) intended to kill the victim, (b) intended to cause grievous
2 bodily harm to the victim, or (c) intended to do an act which,
3 in the circumstances known, a reasonable person would have
4 known created a plain and strong likelihood that death would
5 result. Extreme atrocity means an act that is extremely wicked
6 or brutal, appalling, horrifying, or utterly revolting.

7 Murder in the second degree is different from first
8 degree murder in that it does not require proof of
9 premeditation or extreme atrocity or cruelty. Murder in the
01:52PM 10 second degree requires only that a perpetrator caused the
11 victim's death and acted with malice.

12 The second crime is assault with intent to murder.
13 The crime of assault with intent to murder punishes the
14 attempted commission of a murder. The elements of assault with
15 intent to murder are that the perpetrator assaulted another
16 person and that the perpetrator possessed a specific intent to
17 kill.

18 An assault is an attempted or threatened battery,
19 which is a harmful or offensive touching of another. The
01:52PM 20 assault must be committed with a specific intent to kill the
21 victim, (which may be inferred from the perpetrator's conduct.)

22 Armed assault with intent to murder is the third
23 crime. Armed assault with intent to murder is an aggravated
24 form of assault with intent to murder. The elements of armed
25 assault with intent to murder are (1) that the perpetrator

1 assaulted another person, (2), that the perpetrator possessed a
2 specific intent to cause the death of the person assaulted,
3 and, (3), that at the time of the assault, the perpetrator was
4 armed with a dangerous weapon. A dangerous weapon is any
5 instrument that by the nature of its construction or the manner
6 of its use is capable of causing grievous bodily injury or
7 death, or could be perceived by a reasonable person as capable
8 of causing such an injury. The perpetrator need not display,
9 use, or otherwise make the victim aware of the dangerous weapon
01:53PM 10 to be guilty of armed assault with intent to murder.

11 The fourth crime is conspiracy to commit murder. The
12 elements of conspiracy to commit murder are (1) an agreement or
13 plan between two or more persons, (2) to commit murder, where
14 (3) the perpetrator knowingly joined the conspiracy with the
15 intent that the murder be accomplished. The essence of
16 criminal conspiracy is the knowing agreement to commit an
17 unlawful act. Thus, the perpetrator need not have taken any
18 concrete steps to carry out the plan. The perpetrator can be
19 convicted based on circumstantial evidence that he or she
01:54PM 20 intentionally joined the conspiracy with knowledge of the
21 agreement and its purpose.

22 The following crimes under Massachusetts law also
23 constitute "racketeering acts" under federal law and as charged
24 in the indictment.

25 The first crime is armed robbery. The elements of

1 armed robbery are: (1) a larceny from the victim's person;
2 (2) by force and violence or by assault and putting in fear;
3 and (3) that the perpetrator was armed with a dangerous weapon.
4 A larceny is the taking and carrying away of the personal
5 property of another against his will with the intent to steal.
6 There must be actual or threatened force to steal the victim's
7 property. The degree of force employed is immaterial, as long
8 as there is a causal connection between the perpetrator use of
9 violence and intimidation and the larceny. The perpetrator
01:55PM 10 need not display, use or otherwise make the victim aware of the
11 presence of the dangerous weapon to be guilty of armed robbery.

12 The second crime is armed assault with intent to rob.
13 The crime of armed assault with intent to rob punishes the
14 attempted commission of an armed robbery. The elements of
15 armed assault with intent to rob are: (1) an assault; (2) with
16 a specific intent to rob the person assaulted; and (3) that the
17 perpetrator was armed with a dangerous weapon at the time of
18 the assault.

19 The following federal -- it says crimes, but it's
01:55PM 20 really only one crime -- also constitute "racketeering acts"
21 under federal law, and as charged in the indictment.

22 A conspiracy to distribute control substances or to
23 possess with intent to distribute. Actually, there are two
24 crimes, I apologize. It is also a federal crime to conspire to
25 distribute control substances, including marijuana, or to

1 possess such substances with the intent to distribute. The
2 elements of distribution or possession with intent to
3 contribute a controlled substance are: (1) possession with
4 intent to distribute or distribution of a controlled substance
5 to another person; (2) knowledge that the substance was a
6 controlled substance; and (3) intentional action or conscious
7 object to transfer the controlled substance to another person.
8 It is not necessary that the perpetrator benefit in any way
9 from the transfer.

01:56PM 10 The following crimes under Massachusetts law, among
11 others, do not qualify as "racketeering acts."

12 The first is armed assault with intent to kill. The
13 elements of armed assault with attempt to kill are the same as
14 the elements for armed assault with intent to murder with one
15 important difference. A perpetrator is guilty of the lesser
16 crime of armed assault with intent to kill where he or she
17 (1) assaulted another person; (2) possessed a specific intent
18 to cause the death of the person assaulted; and (3) was armed
19 with a dangerous weapon at the time of the assault, but (4)
01:56PM 20 there was mitigation.

21 The term "mitigation" is used to describe situations
22 where the assault with intent to kill is unlawful but the
23 intention to kill arises from the frailty of human nature, as
24 in the instances of sudden passion induced by reasonable
25 provocation, sudden combat, or excessive force and

1 self-defense. If there is evidence of mitigation, the
2 government must prove beyond a reasonable doubt that the
3 specific intent to kill was not the product of those mitigating
4 circumstances.

5 A perpetrator is not guilty of any crime if he acted
6 in proper self-defense. The law does not permit retaliation or
7 revenge. The proper exercise of self-defense arises from the
8 necessity of the moment and ends when the necessity ends. A
9 person must retreat unless he cannot do so in safety. A
01:57PM 10 perpetrator may only use sufficient force to prevent occurrence
11 or recurrence of the attack. The question of what force is
12 needed in self-defense, however, should be considered with due
13 regard for human impulses and passions, and is not to be judged
14 too strictly.

15 Deadly force is force that is intended to or likely to
16 cause death or serious bodily harm. Nondeadly force, by
17 contrast, is force that is not intended to or likely to cause
18 death or serious bodily harm. A perpetrator should use or
19 attempt to use all proper and reasonable means under the
01:58PM 20 circumstances to avoid physical combat before resorting to the
21 use of deadly force. If the perpetrator based on the
22 circumstances known to him or her at the time had reasonable
23 grounds to believe that he was in immediate danger of harm for
24 which he could save himself only by using nondeadly force and
25 had availed himself of all reasonable means to avoid physical

1 combat before resorting to nondeadly force, then the
2 perpetrator had the right to use the nondeadly force reasonably
3 necessary to avert the threatened harm, but he could no more
4 force than was reasonable and proper under the circumstances.
5 You must consider the proportionality of the force used to the
6 threat of immediate harm in assessing the reasonableness of
7 nondeadly force.

8 The right of self-defense ordinarily cannot be claimed
9 by a person who provokes or initiates an assault, and the right
01:59PM 10 of self-defense ordinarily cannot be claimed by a person who
11 was the first to use or threaten deadly force.

12 If a perpetrator was entitled to use the degree of
13 force he or she used in self-defense, he or she is not guilty
14 of armed assault with intent to murder or armed assault with
15 intent to kill. If the perpetrator was entitled to use some
16 force in his or her self-defense but used excessive force under
17 the circumstances, there is mitigation, and the perpetrator is
18 guilty of armed assault with intent to kill but not armed
19 assault with intent to murder. If the perpetrator was not
01:59PM 20 entitled to use any force in self-defense, there is no
21 mitigation, and he or she is guilty of armed assault with
22 intent to murder.

23 The next crime is voluntary manslaughter. A
24 perpetrator is guilty of voluntary manslaughter if he or she
25 intentionally inflicted an injury or injuries on the victim

1 likely to cause death; (2) caused the victim's death; and (3)
2 did not act in proper self-defense or in the proper
3 self-defense of another.

4 I just explained self-defense in the context of armed
5 assault with intent to kill. The same principles will apply to
6 voluntary manslaughter, and the third crime is involuntarily
7 manslaughter.

8 A perpetrator is guilty of involuntary manslaughter if
9 he or she caused the victim's death, Number 1; Number 2,
02:00PM 10 intended the conduct that caused the victim's death; 3, engaged
11 in conduct that was wanton and reckless; and, 4, did not act in
12 proper self-defense or in the proper defense of another.
13 Wanton and reckless conduct is intentional conduct that created
14 a high degree of likelihood that substantial harm will result
15 to another person.

16 The principal difference between murder and
17 involuntary manslaughter is the nature of the perpetrator's
18 intent. To be guilty of murder, the perpetrator must have
19 acted with malice, that is, with the intent to kill, the intent
02:00PM 20 to cause grievous bodily harm to the victim, or the intent to
21 engage in conduct, which in the circumstances known, a
22 reasonable person would have known created a plain and strong
23 likelihood that death would result, however, if the
24 perpetrator's conduct was merely wanton and reckless, he or she
25 is guilty of the lesser crime of involuntary manslaughter.

1 All right. And, again, going off script, that was the
2 description of certain crimes that do qualify as racketeering
3 acts and a small number of crimes that do not qualify as
4 racketeering acts.

5 All right. Back to the instructions. You've heard
6 evidence that the defendant has been incarcerated since
7 April 6th, 2014. You may consider the fact of his
8 incarceration as part of the evidence in this case. You may
9 not, however, consider that as evidence that the defendant has
02:01PM 10 a bad character or is somehow a bad person and is therefore
11 more likely to have committed the crime charged in the
12 indictment. You have also heard testimony that there was a
13 prior court proceeding involving the defendant. You should not
14 speculate as to the crime charged in that case, the jury's
15 verdict, or any sentence that may have been imposed.

16 A defendant who has joined a conspiracy continues to
17 violate the law through every moment of the conspiracy's
18 existence, and he becomes responsible for the acts of his
19 co-conspirators in pursuit of their common agreement.

02:02PM 20 Nevertheless, it is possible for a defendant who has joined to
21 a conspiracy to later withdraw from the conspiracy. Once a
22 defendant has successfully withdrawn from a conspiracy, he is
23 no longer responsible for acts committed by his
24 co-conspirators. However, even if a defendant later withdraws
25 from a conspiracy, he or she is still guilty of the crime of

1 conspiracy.

2 It is the defendant's burden to show that he has
3 withdrawn from the conspiracy, that is, once the government has
4 proved beyond a reasonable doubt that the defendant was part of
5 a conspiracy, it does not have to also prove beyond a
6 reasonable doubt that the defendant did not later withdraw from
7 the conspiracy. Rather, the burden is on the defendant to show
8 that he did withdraw.

9 In order to withdraw from a conspiracy, a conspirator
02:02PM 10 must act affirmatively to either defeat or disavow the purposes
11 of the conspiracy. Typically, that requires either a full
12 confession to authorities or a communication by the accused to
13 his co-conspirators that he has abandoned the enterprise and
14 its goals. A defendant cannot withdraw simply by ceasing
15 activity in furtherance of the conspiracy or by being prevented
16 from continuing to participate in the conspiracy.

17 I come now to the last part of the instructions, the
18 rules for your deliberations. When you retire, you will
19 discuss the case with the other jurors to reach agreement, if
02:03PM 20 you can do so. You shall permit your foreperson to preside
21 over your deliberations, and your foreperson will speak for you
22 here in court. Your verdict must be unanimous. That is, all
23 of you must agree on the verdict.

24 Each of you must decide the case for yourself, but you
25 should do so only after having considered all the evidence,

1 discussing it fully with the other jurors, and listening to the
2 views of the other jurors.

3 Do not be afraid to change your opinion if you think
4 you are wrong, but do not come to a decision simply because
5 other jurors think it is right.

6 It is important that you reach a verdict if you can do
7 so consciously. You should not hesitate to reconsider your
8 views from time to time and to change them if you are persuaded
9 that this is appropriate.

02:04PM 10 It is important that you attempt to return a verdict,
11 but, of course, only if each of you can do so after having made
12 your own consciousness determination. Do not surrender an
13 honest conviction as to the weight and effect of the evidence
14 simply to reach a verdict.

15 I want to explain to you now what is called the
16 verdict form. This is simply the written notice of the
17 decision you will reach in this case. It's a single page. It
18 has the caption of the case that says, "Verdict Form," and
19 there's a place for you to check guilty or not guilty and a
02:04PM 20 place for the person to sign it and date it.

21 After you have reached a unanimous agreement on your
22 verdict, your foreperson will fill in the form that has been
23 given to you, sign and date it, and advise the jury officer
24 outside your door that you are ready to return to the
25 courtroom.

1 After you have returned to the courtroom, your
2 foreperson will deliver the completed verdict form as directed
3 in open court.

4 If it becomes necessary during your deliberations to
5 communicate with me, you may send through the jury officer a
6 note signed by your foreperson or by one or more members of the
7 jury. No member of the jury should ever communicate with me on
8 anything concerning the case except by a signed writing, and I
9 will communicate with any member of the jury on anything
02:05PM 10 concerning the case only in writing or orally here in open
11 court.

12 If you send out a question, I will consult with the
13 parties as promptly as possible before answering it, which may
14 take some time. You may continue with your deliberations while
15 waiting for the answer to any question. When you are
16 communicating with me, please do not tell me or anyone else how
17 the jury stands numerically or toward which decision the jury
18 is leaning.

19 All right. Let me see counsel at sidebar.

20 (SIDEBAR CONFERENCE WAS HELD.)

21 THE COURT: Ladies and gentlemen, let me make a couple
22 clarifications. The first is I think twice I used the word, at
23 least twice I used the word "narcotics trafficking," and then
24 later I referred to marijuana.

25 We're only talking about marijuana here. I should

1 have used the word "drug," because marijuana is not a narcotic,
2 and it might be confusing, but we're talking about marijuana,
3 which is a controlled substance under federal law.

4 Next, if you would turn with me to page 49, the last
5 sentence above the phrase "voluntary manslaughter," it says,
6 "If the perpetrator is not entitled to use any force in
7 self-defense, there is no mitigation, and he or she is guilty
8 of armed assault with intent to murder."

9 That means only there's no mitigation as to
02:10PM 10 self-defense. There are other ways in which mitigation can
11 exist, for example, reasonable provocation, and so that
12 sentence applies only when the issue is self-defense as opposed
13 to some other form of mitigation, so I wanted to clarify that.

14 All right. A couple follow-up matters, housekeeping
15 and otherwise. The first is if you have any issues involving
16 your personal comfort, you don't need to -- we don't need to
17 convene in open court, if it's too hot or too cold, or you've
18 run out of soda, you don't need to send me a note, but anything
19 else, anything that doesn't involve your own comfort, we're
02:11PM 20 going to need a note, and we're going to have to reconvene in
21 court, Number 1.

22 Number 2, it's now ten minutes after two. I'm about
23 to instruct you to retire and deliberate. You can take as long
24 as you need to make this decision or as little time that as you
25 need. It is entirely up to you. We are here. We'll be here

1 tomorrow. If I haven't heard from you otherwise, I'm going to
2 check in at about five or ten minutes to five o'clock and see
3 where you are. Sometimes jurors want a little more time to get
4 it done that day, sometimes they want to go home. You're the
5 masters of your schedule at this point forward, and, again,
6 it's an important decision, and you're under no obligation to
7 make it at any particular time, and that includes tomorrow as
8 well. We're taking Wednesday off, but you don't have to decide
9 this by Thanksgiving. We're here after Thanksgiving as well,
02:12PM 10 so it's entirely up to you.

11 All right. You will have the exhibits with you in the
12 jury room. It's going to take a little while for us to collect
13 those. You'll also have an electronic system that you can use
14 to look at the exhibits, and we will collect those as soon as
15 we can.

16 I'm going to appoint a foreperson of the jury. The
17 role of the foreperson is simply this, to preside over the
18 discussion and make sure it's orderly and that everyone is
19 having a chance to speak and to make sure that the form is
02:12PM 20 filled out correctly.

21 You are a jury of equals. The foreperson has no extra
22 vote and not entitled to any extra consideration or deference
23 by you except, again, to ensure that the discussion is orderly
24 and that the form is filled out correctly.

25 Ms. Pinciario in seat 9 is in the nursing field, and

1 you probably know how to fill out a form, so I'm going to
2 appoint you to preside over your deliberations.

3 The next thing I have to do, and, unfortunately, I
4 have to do it by law. I don't like doing it, but I have to.
5 We impaneled 16 people, and only 12 of you can deliberate and
6 vote. We thought this case there was a good chance that it was
7 going to go well into December, even conceivably beyond if
8 things didn't go the way we expected, and so we had to impanel
9 some alternates, but I now have to take four of you off, and
02:13PM 10 that means the four of you can't deliberate or vote, and to
11 make matters worse, you don't get to go home because sometimes
12 we lose people during deliberations because they become ill or
13 something else happens during deliberations, so you'll be
14 segregated from the other jurors and not permitted yet to
15 leave, so my apologies, but I'm required to do it, and, the
16 four alternates are going to be the last four people that we
17 impaneled on the day of impanelment, and so that will be
18 Ms. Wilcox-Gonzalez in seat 3, Mr. Zimmerman in seat 12,
19 Ms. Cassidy in seat 16, and Mr. Murphy -- no, names wrong,
02:14PM 20 Mr. Askins in seat 12 and Mr. Zimmerman in seat 8. Wilcox,
21 Gonzalez, Cassidy and Zimmerman, so I apologize to the four of
22 you.

23 With that, I instruct you to retire to the jury to
24 begin your deliberations. We'll get the exhibits up to quickly
25 as quickly as we have them in order, and if I haven't heard

1 from you otherwise, I will check in with you at a few minutes
2 before five o'clock.

3 (Whereupon, the hearing was adjourned at
4 4:59 p.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing transcript,
Pages 1 through 136 inclusive, was recorded by me
stenographically at the time and place aforesaid in Criminal
Action No. 15-10338-FDS, UNITED STATES vs. RAFAEL
LEONER-AGUIRRE and thereafter by me reduced to typewriting and
is a true and accurate record of the proceedings.

Dated this 19th day of July, 2018.

s/s Valerie A. O'Hara

VALERIE A. O'HARA

OFFICIAL COURT REPORTER